

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

No. 11,023
JOINT APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED SEP 14 1951

BELVA CHRISTAKOS,

Appellant,

Joseph W. Stewart

CLERK

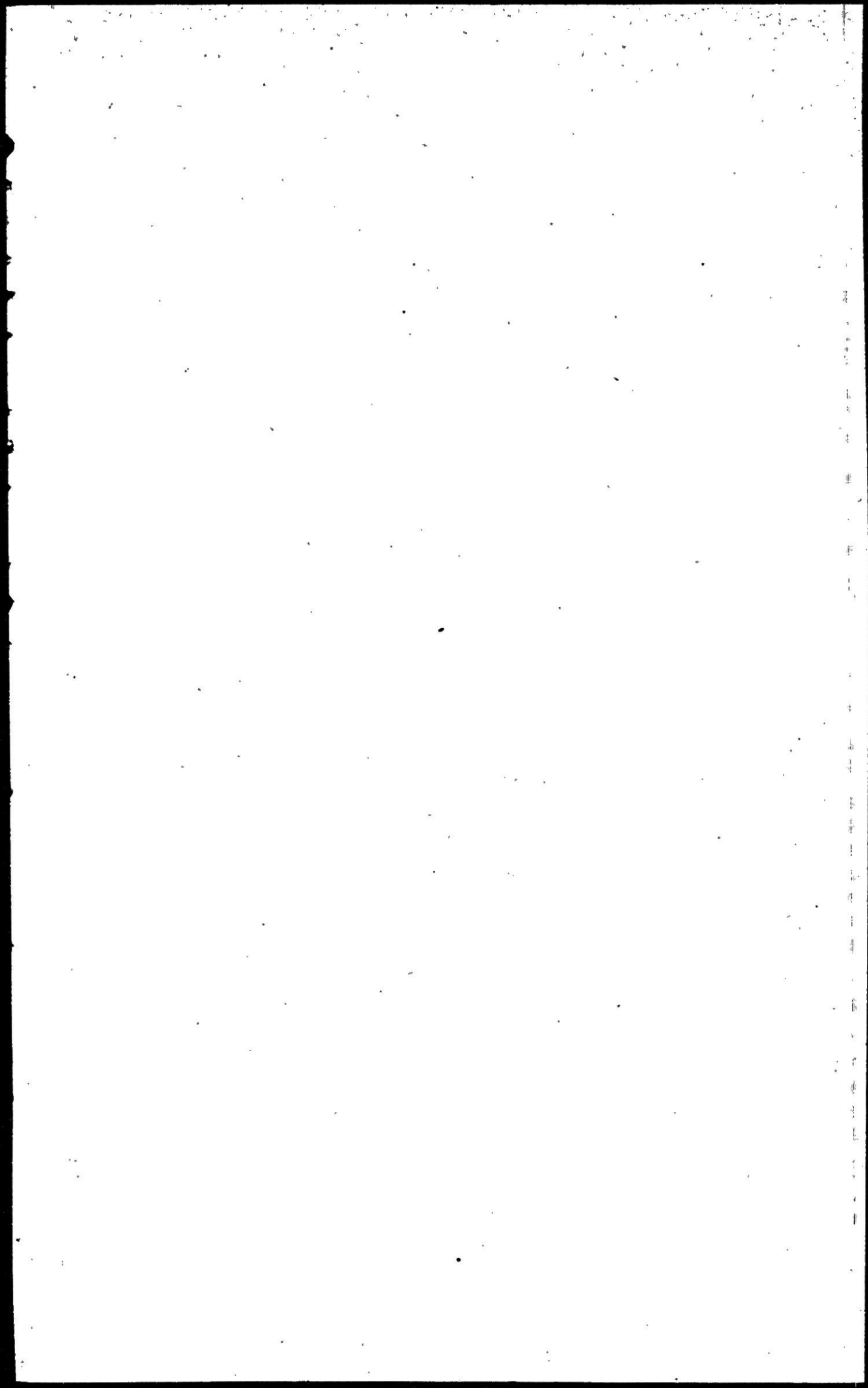
VS.

ROSA LEE LOCKWOOD,

Appellee.

522

Appeal from the United States District Court
for the District of Columbia



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1 A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,023

BELVA CHRISTAKOS,
Appellant,

VS.

ROSA LEE LOCKWOOD,
Appellee.

Appeal from the United States District Court
for the District of Columbia

JOINT APPENDIX

246 Filed Mar 29 1948 Harry M. Hull, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

ROSA LEE LOCKWOOD
3611 Patterson Street, N. W.,
Washington, D. C.,
Plaintiff

vs.

BELVA CHRISTAKOS
948 Shepherd Street, N. W.,
Washington, D. C.

and

NICHOLAS J. GASTON
T/a NICHOLAS J. GASTON COMPANY
501 Woodward Building
Washington, D. C.
Defendants.

Civil Action No. 1281-'48

Complaint

(To Rescind Sales Contract, Cancellation of Chattel Deed
of Trust, For Appointment of Receiver and Damages
for Deceit)

COUNT 1

1. Jurisdiction is based on the equity powers of this Court.

2. Plaintiff is an adult resident of the District of Columbia and a citizen of the United States. Defendant, Belva Christakos, is an adult resident of the District of Columbia and the defendant Nicholas J. Gaston is en-

gaged as a business chance broker in the District of Columbia using the trade name of Nicholas J. Gaston Company.

3. That on, to-wit, the 4th day of March, 1948, plaintiff entered into a written sales contract with the defendant, Belva Christakos, as a result of negotiations conducted through the defendant, Nicholas J. Gaston and his agent and/or employee, for the purchase of the business, known as "Tasty Snack Bar" located at 4300 Georgia Avenue, N. W., Washington, D. C., for the total purchase price of \$20,000.00 and thereafter on the 19th day
247 of March, 1948, in accordance with the said sales contract, the parties entered into a bill of sale for said business and executed a lease for the real estate owned by the defendant, Belva Christakos, in which the business is located and the plaintiff paid to that defendant the sum of \$9,000.00 in cash and executed her promissory note in the amount of \$11,000.00 secured by a chattel deed of trust. Plaintiff took possession of the business on the 20th day of March, 1948.

4. That the defendants, through an agent and/or employee of the defendant, Nicholas J. Gaston, expressly warranted and represented to the plaintiff prior to the execution of the sales contract, as an inducement for her entering into said contract, that the business was doing a minimum gross sales volume of \$240.00 per day. Plaintiff avers that said representation was false in that the average sales volume at the time of the representation was considerably less than \$240.00 per day, to wit, less than \$160.00 per day; that she relied on the representation in contracting for the business and that she had no independent information that said representation was false.

5. That because of the misrepresentations and breach of warranty, by letter of March 25, 1948, plaintiff notified

the defendant, Belva Christakos, that she rescinded the sales contract and tendered back the business upon the refund of the \$9,000.00 paid in cash, the refund of \$69.66 paid as rent to April 1st, 1948, the refund of \$30.00 paid as attorney's fee, cancellation of the promissory note in the amount of \$11,000.00 and cancellation of the lease for the premises. That on the 26th day of March, 1948, the defendant, Belva Christakos, verbally notified the plaintiff that the tender was rejected and informed the plaintiff she would be held to the contract and caused to lose her entire \$20,000.00.

WHEREFORE, plaintiff demands judgment rescinding the sales contract, concellation of said chattel deed
248 of trust and the promissory note for \$11,000.00 secured thereby, the cancellation of the lease executed March 19, 1948, the refund of \$9,000.00 paid in cash, the refund of \$69.66 rent paid to April 1st, 1948, the refund of \$30.00 paid as attorney's fee, the appointment of a receiver to take and sell the business or the equipment and for her costs.

COUNT II

1. That, on, to-wit, the 4th day of March, 1948, plaintiff entered into a written sales contract with the defendant, Belva Christakos, as a result of negotiations conducted through the defendant, Nicholas J. Gaston and his agent and/or employee, for the purchase of the business, known as "Tasty Snack Bar" located at 4300 Georgia Avenue, N. W., Washington, D. C., for the total purchase price of \$20,000.00 and thereafter on the 19th day of March, 1948, in accordance with the said sales contract, the parties entered into a bill of sale for said business and executed a lease for the real estate owned by the defendant, Belva Christakos, in which the business is located and the plaintiff paid to the defendant the sum of \$9,000.00 in cash and executed her promissory note in the amount

of \$11,000.00 secured by a chattel deed of trust. Plaintiff took possession of the business on the 20th day of March, 1948.

2. Plaintiff avers that because of the deceit, fraud and misrepresentations of the defendants, she was induced to purchase from the defendant, Belva Christakos, the business known as "Tasty Snack Bar". That said business was not as represented and warranted by the defendants and as a result thereof the plaintiff in the operation of the business from March 20, 1948 to date has experienced great financial loss and has suffered mental pain and anguish causing her to become extremely nervous and mentally upset.

249 3. That the deceit, fraud and misrepresentations generally alleged in proceeding paragraph Two (2) consisted of the false statement that the business, known as "Tasty Snack Bar" was producing daily average gross sales of \$240.00 or more, when in fact, said business, immediately prior to its purchase by plaintiff, and at the time thereof was averaging considerably less, to-wit, not in excess of, \$160.00 per day. That said representations were made both orally and by newspaper advertisement, were known to be false by the defendants and were relied on by the plaintiff in making her said purchase, all to her damage.

4. That the deceit, fraud and misrepresentations generally alleged in paragraph Two (2) consisted of the false statement that the business, known as "Tasty Snack Bar" was producing a net profit of approximately \$2,000.00 per month, when, in fact, immediately prior to its purchase by plaintiff and at the time thereof was either operating at a loss or at a profit of not in excess of \$500.00 per month. That said representations were made by an employee of the defendant, Nicholas J. Gaston, on behalf of said defendant and the defendant, Belva Christakos, were known

to be false by the defendants and were relied on by the plaintiff in making her said purchase, all to her damage.

WHEREFORE, plaintiff demands judgment against the defendants and each of them, the sum of \$25,000.00 and her costs.

/s/ William E. Furey
 William E. Furey
 /s/ Stephen G. Ingham
 Stephen G. Ingham
 Attorneys for Plaintiff
 Southern Building
 Washington, D. C.

• • • •

250 Filed Apr 16 1948 Harry M. Hull, Clerk

Answer of Defendant Belva Christakos

As to Count I

First Defense

The defendant says that the First Count of the complaint does not state a claim upon which the relief prayed for can be granted.

Second Defense

The defendant admits the making of the written sales contract referred to in numbered paragraph 3 of the First Count of the complaint, and she admits all of the other allegations of the said paragraph.

This defendant says that the bill of sale referred to in the said paragraph 3 of the complaint under which the plaintiff purchased and took possession of the business known as "Tasty Snack Bar" together with the furniture, fixtures, equipment and stock in trade referred to therein

was signed by the plaintiff as well as this defendant and contained, among other things, this provision:

"THE PURCHASER covenants and agrees that the NICHOLAS J. GASTON COMPANY, their agent or servants has made no representations as to the volume of sellers business, profits or as to the value of the equipment or assets herein sold to her and further that the purchaser relies on her independent investigation in the execution of this agreement."

251 This defendant denies that she made or gave any warranty of the substance or to the effect that the business which she so sold to the plaintiff was doing a minimum gross sales volume of \$240.00, per day. She is without sufficient facts on which to admit or deny the allegation in said paragraph 3 as to representations or an alleged warranty made by co-defendant Nicholas J. Gaston, trading as Nicholas J. Gaston Company, to the plaintiff prior to the making of the said sales contract or as an inducement thereof, but says, this: That the said co-defendant Nicholas J. Gaston was not authorized by this defendant to make the alleged warranty or representation; that any oral statements made by the co-defendant on behalf of this defendant, prior to the signing of the written contract were merged in the latter; that the plaintiff relied upon her independent investigation in the making of the said contract; that the average sales volume of the said business at the time when the negotiations for the making of the said contract were under way was as much as \$240.00 per day.

Third Defense

This defendant denies each and every allegation of misrepresentation and of breach of warranty contained in the said complaint. She denies that the plaintiff had or has any legal cause to rescind the aforementioned contract of sale,

but says that the plaintiff without right has violated her agreement with this defendant.

As to Count II

First Defense

This defendant says that the Second Count of the complaint does not state a claim upon which the relief prayed for can be granted.

Second Defense

The allegations of numbered paragraph 1 of the Second Count of the complaint are admitted. This defendant denies each and every allegation of deceit, fraud or misrepresentation alleged against the defendants in numbered paragraphs 2, 3 and 4 of the said Second Count; she denies that any misrepresentation was made by this defendant, directly or through the co-defendant Nicholas J. Gaston, trading as Nicholas J. Gaston Company, or by any one acting on behalf of either of the defendants hereto, concerning the average gross sales from the said business per day or the average monthly net profits from the said business. This defendant further denies that the plaintiff relied upon any representations concerning the business purchased, as aforesaid by her, but says, on the contrary, that the plaintiff relied upon her individual investigation of the said business in the making and consummation of the said contract.

Third Defense

This defendant says that whatever representations were made by the co-defendant, Nicholas J. Gaston on behalf of this defendant and within the scope of his authority as the broker negotiating the aforementioned contract of sale, or by anyone employed by the said co-defendant or

acting for him, concerning the average daily gross sales from the said business or the approximate average net profits therefrom per month, were true.

Fourth Defense

This defendant denies that the plaintiff has sustained the damage claimed by her, or suffered any damage or loss for which this defendant is answerable.

As to Count I and Count II

Further answering, this defendant says that the plaintiff is estopped to claim that she was defrauded as alleged by her in her complaint or that this defendant made the oral warranty or representations relied on by the plaintiff as the basis of her claims asserted in this action, because of plaintiff's own covenant and agreement contained in the said bill of sale, set forth in full, above, in the second defense pleaded to the First Count
253 of the complaint.

WHEREFORE, this defendant prays that the complaint may be dismissed, with costs and counsel fees allowed this defendant against the plaintiff.

/s/ E. Willard Hyde
E. Willard Hyde
710 14th Street, N. W.
Washington, D. C.

/s/ Thomas H. Patterson
Thomas H. Patterson
Woodward Building
Washington, D. C.
Attorneys for Defendant
Belva Christakos

* * * *

254 Filed Jun 28 1948 Harry M. Hull, Clerk

*Amendment to Answer of Defendant Belva
Christakos, With Counterclaim and Cross-Claim.*

Defendant, Belva Christakos, by leave of the court first had and obtained, hereby amends her answer to the complaint filed against her in the above-entitled cause by the plaintiff Rosa Lee Lockwood, in manner and form following:

This defendant renews the several defenses set forth in her original answer to the complaint and adds the following defense to the said complaint and to each count or claim thereof:

Additional Defense

Further answering, this defendant admits that the plaintiff made and delivered to this defendant her promissory note in the principal amount of \$11,000 as the deferred portion of the purchase price of the business and assets which plaintiff purchased from this defendant, as alleged in the complaint, and she admits that this note and the indebtedness which it evidenced were secured by the chattel deed of trust referred to in the complaint. Defendant further says that this chattel deed of trust was executed and delivered by the plaintiff, that defendants John D. Caiopoulos, Trustee, and Marshall J. Waple, Trustee, were the trustees named in the said deed and that they still are such trustees. This deed
255 of trust, dated March 20, 1948, and filed for record on March 23, 1948, in the Office of the Recorder of Deeds for the District of Columbia, is in full force and effect. The plaintiff has defaulted in her agreed payments to be made upon the note secured by the said deed of trust and this defendant is entitled to require a sale of the chattels covered by the said deed of trust

by the trustees therein named; but, because of the dependency of this action, this defendant is advised and alleges that it is appropriate to request this court to direct the defendant trustees to proceed with such foreclosure.

Counterclaim against Plaintiff and Cross-claim against Defendants John D. Caiopoulos, Trustee, and Marshall J. Waple, Trustee.

1. This action is based on the general jurisdiction of this Court. The plaintiff is sued in her own right. Defendants John D. Caiopoulos and Marshall J. Waple are sued only in their capacity as trustees under the chattel deed of trust herein referred to.

2. On, to wit, March 20, 1948, plaintiff Rosa Lee Lockwood, for a valuable consideration made and delivered her certain promissory note to this defendant, Belva Christakos, whereby the plaintiff undertook and promised to pay to this defendant \$11,000 with interest at the rate of 6 per centum, in monthly installments beginning on April 20, 1948. This note was given for the deferred purchase price of a business known as "Tasty Snack Bar" with the assets thereof, then being conducted at premises 4300 Georgia Avenue, Northwest, Washington, D. C. For the security of the payment of the said note and each installment thereof, the plaintiff gave a chattel deed of trust upon the said business assets including a lease of the premises in which the said business was then being conducted, to defendants John D. Caiopoulos and Marshall J. Waple, as trustees.

This defendant is the holder and owner of the
256 said note and two installments of \$350.00 each,
plus interest, are in default of payment and the
plaintiff has refused to pay and denies her liability for
such payment.

WHEREFORE, this defendant demands judgment as follows:

One. Judgment directing the trustees under the aforementioned chattel deed of trust to make sale of the assets constituting the security under the said deed and otherwise to proceed as authorized in the said deed of trust as in case of default.

Two. That the proceeds of the sale of the said assets after the payment of the trustees' commissions and costs of sale be applied to the payment of plaintiff's note secured by the said deed of trust.

Three. That the court make any and all appropriate orders relating to the foreclosure of the said deed of trust and the preservation or disbursement of the proceeds of such foreclosure.

Four. That this defendant have judgment against the plaintiff for any deficiency in the payment of the said note.

Five. And judgment for any and all other temporary or permanent relief appropriate to be granted.

/s/ E. Willard Hyde
E. Willard Hyde
710 14th Street, N. W.
Washington, D. C.

/s/ Thomas H. Patterson
Thomas H. Patterson
Woodward Building
Washington, D. C.
Attorneys for Defendant
Belva Christakos

• • • •

257 Filed Aug 26 1948 Harry M. Hull, Clerk

Order Appointing Receiver Pendente Lite

This cause came on to be heard at this term upon the plaintiff's reinstated MOTION FOR APPOINTMENT OF RECEIVER, and, upon consideration thereof, it is this day of August, 1948,

ORDERED, that David A. Hart be, and he hereby is appointed Receiver pendente lite for all of the assets, personalty, and/or chattels of the business known as the "Tasty Snack Bar" which are in litigation in this proceeding, with the powers and authorities hereinafter contained, upon his filing herein an undertaking with surety approved by the Court in the penalty of Ten Thousand Dollars (\$) conditioned upon the faithful performance and discharge of the trust in him reposed.

FURTHER ORDERED, that the said Receiver upon qualifying as aforesaid shall at once take possession and control of said chattels and cause them to be inventoried and appraised and then report to the Court his recommendations as to the manner in which they should be sold, and report to the Court not later than the 8th of September, 1948.

/s/ R. B. Keech
Justice

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258 Filed Sep 30 1948 Harry M. Hull, Clerk

Report of Receiver Pendente Lite.

By an Order in the above captioned cause, under date of August 26th, 1948, I was appointed Receiver pendente lite for all of the assets, personalty and/or chattels of the business known as the "Tasty Snack Bar" which are

in litigation in this proceeding, with the powers and authorities hereinafter contained, upon my filing herein an undertaking with surety approved by the Court in the penalty of Ten Thousand Dollars (\$10,000.00), conditioned upon the faithful performance and discharge of the trust in me reposed.

Following my appointment as such Receiver I qualified as such by filing an undertaking in the required amount, with the United States Fidelity & Guaranty Company as surety on my bond.

Thereafter I immediately took possession and control of said chattels and caused them to be inventoried and appraised by Adam A. Weschler & Son, the original of which appraisal is attached hereto and prayed to be read as a part hereof, showing the value of the personal property to be Six Thousand One Hundred Twenty-Nine Dollars and Sixteen Cents (\$6,129.16).

Your Receiver in an effort to see whether a satisfactory compromise could be made between the parties had several conferences with the respective attorneys representing the parties hereto, but learned from such conferences that the parties were hopelessly in disagreement.

259 This Receiver believes and avers that the nature of this proceeding is for the rescission of a contract of sale of a restaurant business on the grounds of fraud and misrepresentations. That prior to filing this proceeding the plaintiff notified the defendant, Belva Christakos, in writing, of the rescission and tendered back the business and chattels upon refund of the \$9,000.00 purchase money paid and cancellation of the chattel deed of trust and lease. I understand this was rejected by the said defendant.

It is the opinion of your Receiver that the chattels concerned in this proceeding have their greatest value,

for sale purposes, fixed as they are in their present location and believes that their sale as such would realize substantially more than any sale, public auction or private sale, piece by piece for removal from the premises.

Without attempting to decide the issue between the parties, it is the opinion of your Receiver that the rejection of the rescission by the defendant, Belva Christakos, leaves the parties in the status they held immediately prior to the rescission and therefore recommends that the Court compel the said defendant to join with the Receiver in a sale of the entire business, as set forth above, by giving a lease for the premises to a purchaser on the same terms and conditions as contained in the lease entered into between the plaintiff and the defendant.

Respectfully submitted,

/s/ David A. Hart

David A. Hart,

815 15th Street, N. W.,

Washington 5, D. C.

Receiver Pendente Lite.

• • • •

266 Filed Nov 4 1948 Harry M. Hull, Clerk

Order Withdrawing Receiver and Appointing Trustee

This cause came on to be heard at this term upon consideration of the report of the Receiver pendente lite, filed herein, and upon hearing in open Court; and upon agreement of counsel, it is this 2nd day of November, 1948, ORDERED:

1. That the order heretofore passed in this cause on August 26th, 1948, appointing David A. Hart receiver pendente lite for all the assets, personalty and other chat-

tels in the business known as the Tasty Snack Bar, be and the same is hereby withdrawn.

2. That David A. Hart be and he hereby is appointed as Trustee under a second deed of trust covering premises 4300 Georgia Avenue, Northwest, Washington, D. C., said deed of trust to be executed by the defendant, Belva Christakos in the amount of Five Thousand Dollars (\$5,000.00); and also as Trustee under a certain chattel mortgage to be executed by said defendant against the chattels listed in the inventory filed herein with a report of said receiver, said chattel deed of trust to be in the sum of Six Thousand Dollars (\$6,000.00).

3. That said Trustee is to hold the said second deed of trust and chattel mortgage to secure the plaintiff as follows: That in the event the plaintiff prevails in this cause and if any final judgment is not paid within ten (10) days after becoming final, said Trustee is authorized and directed to proceed with the foreclosure of the second trust and the sale of the chattels covered by the chattel mortgage, and from the proceeds of the sales, satisfy judgment, if any, in favor of the plaintiff.

267 That in the event defendant, Belva Christakos, prevails in this proceeding, said Trustee shall, within ten (10) days from a final order, execute a release of said second trust and chattel mortgage.

IT IS FURTHER ORDERED:

4. That the defendant, Belva Christakos, shall have the option of substituting the equivalent cash for the like amount of security held by said Trustee, at any time.

5. That the defendant, Belva Christakos, cancel the lease, dated March 19, 1948, between her and the plaintiff; that she cancel the promissory note dated March 20, 1948, in the amount of Eleven Thousand Dollars (\$11,-

000.00), and that she obtain a release of the chattel mortgage executed by the plaintiff to Marshall J. Waple and John D. Caiopoulos, Trustees, to secure said defendant.

6. That the payment of the Receivers' fee and expenses and the payment of the Trustee's fee shall await final determination of this proceeding.

/s/ R. B. Keech
Judge.

• • • •

268 Filed Apr 3 1951 Harry M. Hull, Clerk

Findings of Fact and Conclusions of Law
Findings of Fact

The plaintiff, on March 19, 1948, purchased a restaurant business known as the Tasty Snack Bar, located at 4300 Georgia Avenue, N. W., from the defendant through Nicholas J. Gaston, broker, for Twenty Thousand Dollars (\$20,000.00), of which Nine Thousand Dollars (\$9,000.00) was paid in cash and the balance evidenced by a promissory note secured by a chattel mortgage on the equipment. Defendant had operated the business from September 11, 1947, until the sale to plaintiff.

Plaintiff first became interested in the purchase of the business as a result of reading an advertisement inserted by defendant's broker in The Evening Star on December 4, 1947; said advertisement stated that the business was realizing daily sales of Two Hundred Fifty Dollars (\$250.00) and a net profit of Two Thousand Dollars (\$2,000.00) a month. Plaintiff called the broker concerning the advertisement.

Another advertisement appeared in The Evening Star on January 18, 1948, was read by plaintiff, and thereafter a salesman for defendant's broker read to the plaintiff

a further advertisement which was to appear in the newspaper on March 4, 1948. These advertisements stated that the business had daily sales of Two Hundred Fifty Dollars (\$250.00) and Two Hundred Forty Dollars 269 (\$240.00), respectively, but made no mention of net profit.

After the advertisement of January 18, 1948, plaintiff made her first visit to the business and on that occasion and one later, she watched the business for a short time for the purpose of determining the volume of business.

The salesman for defendant's broker, in each of several conversations with plaintiff, assured her that the business was doing Two Hundred Fifty Dollars (\$250.00) a day and realizing Two Thousand Dollars (\$2,000.00) a month net profit.

Plaintiff took possession of and began operating the business on March 20, 1948, retaining the same employees who had worked for the defendant. The public was not notified of any change in ownership.

Plaintiff operated the business for eight (8) days when she closed it, giving the keys thereto to her attorney who had, on March 25, 1948, written and mailed a letter to defendant rescinding the sale.

The daily sales for said period of plaintiff's operation were substantially under the volume represented by defendant. There was no showing of plaintiff's profits during her period of operation.

Plaintiff is not experienced in business, whereas defendant is a very experienced businesswoman, having operated and sold a number of restaurants prior to the one involved in this proceeding.

Plaintiff rescinded the contract by the letter to the defendant of March 25, 1948, tendering back the business

against refund of the purchase money paid and cancellation of the note, chattel mortgage and lease. The tender was refused by the defendant.

270 There is sufficient evidence that the representations were false or in reckless disregard of the truth. The representations, by the advertisements and orally, made by defendant through her broker's salesman concerning the daily sales and net profit of the business, with particular reference to the period covered by the advertisement of December 4, 1947, were false, recklessly made and relied on by the plaintiff.

The business remained closed until November, 1948, when, because of a recommended foreclosure sale by a Court appointed receiver, a consent Order was entered in this cause on the 2nd day of November, 1948, under the terms of which the plaintiff and the defendant released the plaintiff from any and all obligations to the extent provided for in said Order.

Conclusions of Law

1. That the three advertisements and the oral statements respecting daily sales and net profit were continuing representations inducing the plaintiff to enter into the contract of purchase.

2. That the false representations were made with such a reckless disregard of the truth as to constitute fraud and were relied on by plaintiff in making her purchase.

3. That the letter of March 25, 1948, referred to in the findings constituted sufficient tender.

4. That the filing of this suit also constituted sufficient tender.

5. That the tender back of the business, by the letter referred to in No. 3 above, against return of the cash

payment and cancellation of the promissory note, chattel mortgage and lease was an effective rescission of the contract.

271 6. That plaintiff, as a matter of law, is entitled to judgment against the defendant in the sum of Nine Thousand Dollars (\$9,000.00), interest from March 25, 1948, and costs.

7. That the receiver and trustee served for the benefit of both plaintiff and defendant and they shall each pay one-half of his expenses and fee to date.

/s/ Walter M. Bastian
Judge

• • • • •

272 Filed Apr 3 1951 Harry M. Hull, Clerk

Judgment

This cause came on to be heard at this term, and, upon consideration of the pleadings, the testimony adduced and argument of counsel, it is this 3rd day of April, 1951,

ORDERED, That the plaintiff, Rosa Lee Lockwood, shall have judgment against the defendant, Belva Christakos, in the amount of Nine Thousand Dollars (\$9,000.00), interest thereon from March 25, 1948, and her costs.

FURTHER ORDERED, That the plaintiff and the defendant shall each pay one-half of the expenses and fee of the receiver and trustee herein, David A. Hart, in the amount of Three Hundred Seventy Five Dollars (\$375.00). That in the event said trustee is directed to sell, in accordance with the provisions of the Order entered herein on November 2, 1948, he shall be entitled to a commission as provided for under the rules of this Court.

/s/ Walter M. Bastian
Judge

273 Filed Apr 12 1951 Harry M. Hull, Clerk

Notice of Appeal

Notice is hereby given this 12th day of April, 1951, that Belva Christakos hereby appeals to the United States Court of Appeals, District of Columbia Circuit, from the judgment of this Court entered on the 3rd day of April, 1951, in favor of the plaintiff, Rosa Lee Lockwood, against the defendant, Belva Christakos.

/s/ S. J. Pokrass
S. J. Pokrass

/s/ M. S. Mazzuchi
M. S. Mazzuchi
1017 Denrike Building
Washington, D. C.
Attorneys for Defendant

3 MR. INGHAM: For the purpose of the record and to make an amendment to conform to the proof to be adduced at this trial, the plaintiff intends to stand on Count 1 of the complaint and I would like to amend Paragraph 4 of Count 1 to the extent that an additional representation was made to the plaintiff by the defendant, through her agent, that the business was netting \$2,000 per month. That allegation is contained in Count 2 but we are relying on Count 1 and not asking for damages for deceit. We are standing solely on the rescission provision of Count 1.

4 THE COURT: I will permit the amendment. If the other side wants time, I will continue the case to give them time to prepare for it.

5 THE COURT: Let the record show I offered the defendant a continuance, if he so wished, and the defendant concluded to proceed.

You had better let the other side and the Court have the exact language of the amendment.

MR. INGHAM: I am preparing it right now, Your Honor.

In Paragraph 4 of Count I of the complaint, beginning at Line 6 after the word "day", and I believe there was a previous amendment showing \$240 and \$250 per day, right after "day"—"and a net profit of \$2,000 per month."

There is an additional portion four lines below after "day"—"and that the net profit was considerably less than \$2,000 per month."

6 *Thomas Nicholas Vassil*

called as a witness by the plaintiff, being duly sworn, was examined and testified as follows:

Direct Examination

BY MR. INGHAM:

Q Mr. Vassil, will you please state your full name?

A Thomas Nicholas Vassil.

Q What is your occupation, Mr. Vassil? A Business chance salesman.

Q With what company are you connected? A Nicholas J. Gaston Company.

Q In what capacity? A As a salesman.

Q Do you have a listing card or listing cards kept in the regular course of business of Nicholas J. Gaston

Company in which the Tasty Snack Bar was listed for sale?

* * *

7 BY MR. INGHAM:

Q Do you have a listing card? A Yes.

Q Are these cards kept in the regular course of business of the Gaston Company? A Yes.

* * *

9 (Listing cards for sale of Tasty Snack Bar by Gaston Co. were marked Plaintiff's Exhibits Nos. 1 and 2 and received in evidence.)

* * *

10 *Rosa Lee Lockwood*

* * *

11 *Direct Examination*

* * *

Q Mrs. Lockwood, did there come a time when you became interested in the purchase of a business known as The Tasty Snack Bar? A Yes. I read an ad that was inserted in the paper of December 4, 1947.

MR. INGHAM: This also has been admitted as a Pre-Trial exhibit, Your Honor.

(The advertisement of December 4, 1947, was marked Plaintiff's Exhibit No. 3 for identification.)

BY MR. INGHAM:

Q I show you this ad, Mrs. Lockwood, and ask you whether this is the ad you referred to, the second ad in Column 2? A Yes, that is the ad.

MR. INGHAM: I offer this as Plaintiff's Exhibit No. 3.

12 THE COURT: Which ad is this, December—

MR. INGHAM: December 4, 1947, Your Honor.

MR. POKRASS: I am pretty well acquainted with that

ad, Your Honor, and at this point I would like to object to the introduction of that ad in evidence on the grounds that it is immaterial and irrelevant.

There is nothing in the ad that refers to this particular business.

THE COURT: I will admit it. I assume you are going to connect it up?

MR. INGHAM: Yes, Your Honor.

(Plaintiff's Exhibit No. 3 previously marked for identification was received in evidence.)

BY MR. INGHAM:

Q After seeing that ad, Mrs. Lockwood, what did you do? A Well, the first part of January 1948, I called up the telephone number which appeared in the ad and found that the broker's name was Gaston & Company.

* * *

13 Q As a result of this ad, what did you do? A Well, I went up to see the business, is that what you mean?

Q Yes. A Yes.

* * *

14 BY MR. INGHAM:

Q As a result of the conversation with someone at Gaston & Company, did you see the business? A Yes; I went up to see the business.

Q Where was it located? A It was located at 4300 Georgia Avenue.

Q And after seeing the business, did you have any conversation with anyone else or anyone at Gaston & Company? A Yes.

* * *

15 Q Did you talk to Mr. Gaston himself, about this property? A No; not until the 4th of March. I talked with him for just an instant.

Q How many conversations did you have with Mr. Lambros? A Four or five.

Q Did Mr. Lambros furnish you any information with respect to this property? A Yes.

THE COURT: Where did you have those conversations?

THE WITNESS: Well, I had them over the telephone until the 4th of March. Then I went down to Mr. Gaston's office and Mr. Lambros was there and we had a very lengthy conversation, that is, my son, Mr. Lambros and myself, in Mr. Gaston's office. We talked about two hours, two hours and a half.

16 THE COURT: Who was there at the time?

THE WITNESS: Mr. Lambros, my son and myself.

THE COURT: Was Mr. Gaston there?

THE WITNESS: Mr. Gaston was there. I met him and talked a very few minutes with him.

THE COURT: I will let you ask the question.

BY MR. INGHAM:

Q In your earlier conversations prior to March 4, did there come a time when Mr. Lambros identified his capacity or his association with Gaston & Company in any way? A Yes. He said he was an agent of Mr. Gaston and had charge of the business.

MR. POKRASS: Object, if Your Honor please.

THE COURT: I am going to let it in subject to a motion to strike if it is not connected up.

BY MR. INGHAM:

Q After you visited the restaurant shortly after the first of January, what occurred? A Mr. Lambros called me up and asked me how I liked the business—

MR. POKRASS: Object.

THE COURT: Just a moment. Under Count I is this case going to be dismissed as to Mr. Gaston?

MR. INGHAM: It has already been dismissed as to him.

THE COURT: So the only defendant in the
17 case is Christakos?

MR. INGHAM: That is right and within the last few days—I don't know if it appears of record—the two defendants have dismissed the cross complaint against one another.

THE COURT: So this is now strictly a suit of Lockwood against Christakos?

MR. INGHAM: That is right, Your Honor.

THE COURT: Will you read the last question and answer, Miss Rawls?

(Thereupon, the last question and answer were read by the reporter.)

THE COURT: I will overrule the objection with the right to strike it unless you connect up the agency of Lambros to Gaston.

BY MR. INGHAM:

Q What happened after that, Mrs. Lockwood? A Another ad appeared in the paper of January 18 about the same business and I talked with Mr. Lambros further about it.

Q I show you this portion of the Evening Star dated Sunday, January 18, 1948, and referring you to the seventh ad from the bottom of the second column, is that the ad that you saw? A Yes, that is the ad.

18 MR. INGHAM: Do you have any objection to this?

MR. POKRASS: No; except on the same ground as before, Your Honor; in other words, subject to being tied up.

THE COURT: Very well.

(The ad in the Evening Star dated January 18, 1948, was marked Plaintiff's Exhibit No. 4 and received in evidence.)

BY MR. INGHAM:

Q After seeing that ad, Mrs. Lockwood, what took place? A Well, my sister and I went up to see the

business and I saw Mr. Christakos. It was a very sleety, icy day and it had taken about three-quarters of an hour to get there. I had called Mr. Christakos up first to see if it would be convenient to look over the restaurant and he said it would but the streets were quite icy and it took me about three-quarters of an hour to get there so when I got there, he said it was getting to be a busy time of the day and I wouldn't be able to see it but to come back later but on account of the hazardous condition of the streets, I didn't go back that same day.

Q In your conversation with Mr. Christakos, did you discuss the sale of the business? A Yes.

Q Did you advise him how your interest started
19 in the purchase? A Yes.

Q What was that conversation?

* * *

Q Prior to March 4 of 1948, did you have any conversation with Mrs. Christakos with respect to purchasing the business? A With Mrs. Christakos?

Q Yes. A No.

Q On how many occasions did you visit the premises?
A Well, I went up again with my son about two weeks after I visited it with my sister and the same thing took place.

Q Did you ask anyone on the premises for the right to inspect? A Yes; Mr. Christakos.

Q Did you ask to see the books and records of
20 the business? A Yes.

MR. POKRASS: Object, if Your Honor please. That testimony is still hearsay.

THE COURT: Who did you ask?

THE WITNESS: Mr. Christakos was in charge of the restaurant and since he was the husband of Mrs. Christakos—

MR. POKRASS: That is a conclusion, if Your Honor please.

THE COURT: I think in some way you have to tie him into the picture.

BY MR. INGHAM:

Q Did Mr. Christakos identify himself on your first visit to the restaurant? A Yes.

Q How did he identify himself? A He said he was Mr. Christakos and he was just part owner in the business.

Q He said he was part owner of the business? A Yes.

Q Did he offer to show you the business? A No. You see I had made the appointment with him but I got up there about three-quarters of an hour late and he wouldn't let me go through the business.

Q When you called up on the phone, what arrangements did you make? A I asked him if I could come up and see the business and he said it would be agreeable. As I say, it took me a little longer than we had anticipated because of the condition of the streets.

Q When you arrived, you didn't have the opportunity to inspect? A Yes.

MR. POKRASS: I would like to make the objection on the record to all the testimony had between or the conversations had between the plaintiff and Mr. Christakos and I move that it be stricken from the record.

THE COURT: I think I can let it in, Mr. Pokrass. He is the husband of this lady who was apparently in charge of the business. I am going to let it in and you will have an exception.

BY MR. INGHAM:

Q After your visit to the restaurant with your sister, will you tell us what next occurred? A Well, I went up several weeks later with my son to inspect the business and, as I say, we weren't permitted to go through it, through the building.

Q You say you weren't permitted. In what respect weren't you permitted to go through the building? A

We didn't go downstairs to see the basement which was supposed to be fitted up as an office.

22 Q Why didn't you go downstairs? A Mr. Christakos, on both occasions, said it was a busy time of the day and he wouldn't be able to take the time to show me around.

Q Was Mrs. Christakos on the premises on any of the occasions of your visits? A No; not either time.

Q Then what occurred after that, Mrs. Lockwood? A On the 4th of March, Mr. Lambros called up and said he was inserting an ad in the Evening Star as of March 4 advertising the business at a rock bottom price on account of the health of Mr. Christakos and Mrs. Christakos.

MR. POKRASS: I make the same objection, if Your Honor please.

THE COURT: Yes, I understand your objection goes to all of this testimony and you have the right to strike but we have to give them the opportunity to offer it and then connect it up.

BY MR. INGHAM:

Q Then what happened? A And he asked if I would be interested in the business at this new low figure and went into detail about the daily volume of sales and the net profit per month and whatnot. I talked with him about, I should say, almost half an hour and then I told him I was coming down to his office, so my
23 son and I went down to his office a little later, probably an hour later.

THE COURT: What office was that?

THE WITNESS: The office of Mr. Gaston.

BY MR. INGHAM:

Q What occurred while you were at the office of Nicholas J. Gaston? A On the 4th of March?

Q On the 4th of March. A Mr. Lambros went into detail about the business or what I thought was detail

about the business and he talked about the volume of sales being around \$250 and also—

Q \$250, relating to what? A Sales of the business of The Tasty Snack Bar; is that what you mean?

Q Tell us exactly what he said with respect to the \$250 item? A Well, he said that the business had a daily volume of business there of around \$250. He didn't say "around". He said \$250 and a net profit of \$2,000.

THE COURT: \$2,000—per day, month or year?

THE WITNESS: Net profit per month.

My son and I were down there about two hours or maybe a little over.

24 BY MR. INGHAM:

Q Then what happened? A Well, I signed a contract of sale there.

Q I show you this paper and ask if you can identify it? A Yes; that is my signature.

Q Is that your signature? A Yes.

MR. POKRASS: No objection.

(Sales contract dated 3/4/48 signed by Rosa Lee Lockwood and Belva Christakos was received in evidence as Plaintiff's Exhibit No. 5.)

BY MR. INGHAM:

Q Are you familiar with the signature of Mr. Lambros? A Well, only so far—

Q Did he sign this in your presence? A He signed it, yes.

Q Is that his signature as he signed it? A Yes.

Q Are you familiar with the signature of Mrs. Christakos? A Only as she signed it later.

Q And that is as she signed it on the 19th? A Yes.

THE COURT: Is there any doubt she signed it?

MR. POKRASS: Did she testify she saw Mrs. Christakos sign this?

25 MR. INGHAM: On the 19th.

THE WITNESS: No, I didn't say I saw her sign that.

MR. POKRASS: I thought you didn't say that.

THE WITNESS: No.

MR. POKRASS: I thought you were testifying that she signed that.

MR. INGHAM: She didn't sign this in your presence?

THE WITNESS: No; I don't think so. I thought you asked me if I was familiar with her signature and I said I had not seen her signature until the 19th of March.

THE COURT: Is it conceded that she signed it? Is that her signature?

MR. POKRASS: It is conceded that the defendant signed that, yes, but I was just under the impression that the witness testified she saw it signed.

THE WITNESS: No.

BY MR. INGHAM:

Q Mrs. Lockwood, I show you a portion of the Evening Star newspaper dated March 4, 1948, Thursday, about half-way up the first column and I refer you to an ad and ask you whether or not that is the ad read to you by Mr. Lambros? A Yes, that is the ad.

MR. INGHAM: I offer this as Plaintiff's Exhibit No. 6.

MR. POKRASS: Subject to the same objection.

THE COURT: Very well, it will be received.
26 (Ad in Evening Star dated March 4, 1948, was received in evidence as Plaintiff's Exhibit No. 6.)

BY MR. INGHAM:

Q Was that ad read to you prior to your signing the sales contract or afterward? A Yes; prior to it.

May I go into the conversation of Mr. Lambros before I signed?

Q That won't be necessary now.

Mrs. Lockwood, I show you this paper and ask you if you can identify that? A Yes, I do.

Q When did you receive that paper? A Well, Mr. Lambros had it typed up while we were there.

Q Did he have it typed up while you were present in his office? A Yes.

MR. POKRASS: I object to this. It is evidently some document purported to have been signed by Mr. Lambros.

MR. INGHAM: If Your Honor please, it shows the receipt of a check for \$800 and personal note for \$2,000 payable in 30 days, "to be held by this office in escrow as deposit relative to the purchase of the Tasty Snack Bar, 4300 Georgia Avenue, N. W.," and it is signed Nicholas J. Gaston Company by S. Peter Lambros.

THE COURT: I will admit it under the same condition.

(Paper showing receipt of \$800 and personal note for \$2,000 by Nicholas J. Gaston Co., by S. Peter Lambros, dated March 4, 1948, was marked Plaintiff's Exhibit No. 7 and received in evidence.)

BY MR. INGHAM:

Q Subsequent to signing the contract of sale, what next occurred, Mrs. Lockwood? A I don't understand what you mean?

Q What happened after your visit of March 4th to the office of Mr. Gaston?

THE COURT: Excuse me just a minute. Did Mr. Lambros sign this on the day indicated, in your presence?

THE WITNESS: Yes, sir, he did.

THE COURT: And in the office of Mr. Gaston?

THE WITNESS: And in the office of Gaston & Company.

BY MR. INGHAM:

Q What next occurred, Mrs. Lockwood, after your meeting of March 4th? A Well, Mr. Lambros called me up to appear in Mr. Walker's office on the 19th to sign papers.

Q On the 19th of what? A The 19th of March, 1948.

28 Q Who is Mr. Walker? A Mr. Walker was the attorney—

Q Whose attorney? A Well, he was the attorney of both Mrs. Christakos and myself.

Q Who selected him? A Mr. Lambros.

Q Who was present when you arrived at that office?

A Mr. Walker, Mr. Lambros and Mrs. Christakos.

Q At that time, did you have any conversation with Mrs. Christakos with respect to the sale of the business?

A No. In fact, I didn't know who she was until 10 or 15 minutes after I arrived.

Q What happened when you arrived at the office of Mr. Walker? A I don't think I quite get the question there.

Q Did they tell you the purpose of your visit there?

A Yes; to sign the bill of sale.

Q Who advised you of that? A Mr. Walker.

Q Did you have any conversation with Mr. Lambros there? A Not anything in particular.

Q Was anyone, other than Mr. Lambros there,
29 representing Nicholas J. Gaston? A No; just Mr. Lambros.

Q Did you observe Mr. Lambros and Mrs. Christakos having any conversation at that time? A Well, just before we signed, Mr. Walker had given us both a copy of the contract to look over and Mrs. Christakos and Mr. Lambros had a few words but I didn't understand because they were speaking in Greek. I don't know what it was.

Q Were you introduced to Mrs. Christakos at that meeting? A Yes.

Q Who introduced you to her? A Mr. Lambros.

Q I show you this paper dated March 19, 1948, and ask you whether or not that is the paper you signed?

A Yes; that is my signature.

Q That is your signature? A Yes.

Q There is a signature above yours. Was that inserted in your presence? A Yes; they all were.

Q They all were— A Signed in my presence.

Q And the signature, Mrs. Christakos wrote it
30 while you were sitting there? A Yes.

Q And it was notarized at the same time, is that correct? A Yes; that is right.

MR. INGHAM: I offer this as Plaintiff's Exhibit No. 8.

THE COURT: Very well.

(Bill of sale dated the 19th of March, 1948, was marked Plaintiff's Exhibit No. 8 and received in evidence.)

BY MR. INGHAM:

Q Did you have any further conversation at that meeting of March 19 with anyone present? A No; there was no further conversation.

Q Were arrangements made for you to take possession of the business? A Yes; I took possession the next morning.

Q With whom did you make those arrangements? A With Mrs. Christakos.

Q And did you take possession of the business the following morning? A Yes; I took possession the next morning, that is, March 20.

Q What arrangements did you make with Mrs. Christakos with respect to taking over the business? A Well, just that I take it over the next day.

Q Did she deliver the key to you at that time?
31 A Yes.

Q At the meeting on March 19? A No; the next morning.

Q The next morning? A Yes.

Q At what time was that? A The man that they had usually come on at 6 o'clock opened the business and my son was over there at the same time. It was later on in the morning that she turned the keys over.

Q What time was that, do you recall? A No; I don't. It was about 10 o'clock probably.

Q What were you to pay for the purchase of this business? A \$20,000.

Q Did you pay any part of that? A I paid \$9,000.

Q To whom did you pay that? A To Mrs. Christakos.

Q By check or cash? A By check.

Q And the balance was to be made up how? A By a note.

Q Did you execute that note? A Yes.

32 Q Who did that note run to? A Mrs. Christakos.

Q Did you deliver that note to her? A Yes.

Q Were you in the business yourself on March 20, 1948? A Yes; I was there.

Q How long did you stay there? A I stayed until about 7 to 7:30.

Q Was Mrs. Christakos there at any time during the day? A Yes; she was there all day Saturday.

Q What was the purpose of her being there at that time? A She was going to help me with the business and show me what needed to be done and so forth.

Q Did you have any conversation with her that day with respect to the sales volume? A I believe not except when we took the amount of the cash register about 6 o'clock, I was very much disappointed in the amount shown on that and I spoke about it.

Q What was the amount, if you recall? A It was just \$80 that we had taken in at 6 o'clock and, of course, I had expected by that time to take in quite a large amount.

33 Q What exactly was your conversation with Mrs. Christakos about those receipts? A Well, I told her how disappointed I was and she said that we still had until 12 o'clock that night to make up the difference between the \$80 and the \$250.

Q Did Mrs. Christakos stay for the rest of the day there? A That night, you mean?

Q Yes. A No; she was not there that night.

Q What occurred the following day? A As regards Mrs. Christakos?

Q Yes. A She was there part of the day; part of Sunday.

Q How long did you operate the business, Mrs. Lockwood? A I closed it on the 27th of March.

Q Do you have your records showing what your daily receipts were for those days? A Yes; I have.

Q Starting with March 20, the first day of operation, will you give us the daily sales for each day? A The daily sales?

Q Yes. A Well, March 20, we took in \$137.23. The 21st, which was Sunday, we took in \$158.69. The 34 22nd, we took in \$124.37. On the 23rd, we took in \$121.30; the 24th, it was \$133.76; the 25th, it was \$132.46; the 26th was \$129.73 and the 27th was \$135.80.

Q The 27th was your last day of operation? A That was the last day, yes.

Q Did you have any conversation with Mrs. Christakos after your conversation on March 20th with respect to the operation of the business, while you were in possession? A I called her up on Wednesday.

Q What date would that have been? A It must have been about the 24th, I guess.

Q What was your conversation with her at that time? A I told her I was very much disappointed in the business and asked her if she would take it back.

Q What was her answer to that? A She said she would have to talk with her husband about it and then she called me back later and said that he said no, they wouldn't do it.

Q When you assumed possession of the business, did you physically change the structure of the restaurant? A Not at all.

Q Did you insert any ads that the business was under new management? A No; there were no signs or ads about it.

35 Q Did you have the same employees? A The same employees that she had had.

Q Who was physically running the business during the week or from March 20th through March 27th? A Well, they had a man who was quite efficient, it seemed to me. They called him Mr. David. I have forgotten his last name. Everyone spoke of him as Mr. David and he was quite a help.

Q Had he been employed by Mrs. Christakos? A He had been employed by Mrs. Christakos.

Q In what capacity, do you know? A No; just behind the counter.

Q And he was more or less running the business for you, is that correct? A Yes.

Q What was the occasion for your closing the business down on March 27th or after March 27th? A On the advice of my attorney.

Q What was the reason actually for closing it down? A Well, on account of the poor business of the restaurant.

Q And on any day during that period, did you realize \$250 in sales? A No.

THE COURT: I think you have that evidence in. I assume you don't need to ask that question.

36 BY MR. INGHAM:

Q Mrs. Lockwood, prior to your signing the contract in this case, had you ever operated a restaurant business before? A No; I had not.

Q Had you had any business experience of any kind? A No.

Q After closing this business and pending this litigation, did you have occasion to examine Mrs. Christakos' books? A I did, in your office.

Q Did you examine the figures from September 11 through December 31, 1947? A Yes.

Q Did you find any day in which the sales amounted to \$250? A No; not nearly.

* * * *

38 Q Mrs. Lockwood, you stated that your son was in the business with you? A Yes.

Q Or worked there. Where is your son now? A He is in Service.

Q Where? A Tampa, Florida.

Q What branch of the Service is he in? A Air Force.

Q How long has he been in the Service? A Since August.

Q And is he available in the District of Columbia for trial today? A No.

MR. INGHAM: You may examine.

Cross Examination

BY MR. POKRASS:

Q Mrs. Lockwood, did you read these advertisements carefully? A Yes.

39 Q The first one that you read, I believe you testified, was December 4th? A That is right.

Q Yet after reading that advertisement, you didn't buy the business, isn't that right? A That is right.

Q And furthermore, you first went to see that business about a month later? A That is right.

Q And that was, of course, after a second advertisement, I believe of January 4th?

THE COURT: January 18, according to what I have here.

BY MR. POKRASS:

Q January 18th? A Yes.

Q That was the first time you had gone there. Do you recall what your impression was about the business after your first visit? A Yes; I thought it was a very nice business and told Mr. Lambros so except I did think the price was very high.

Q How do you draw that conclusion that it was a

very nice business? A Well, it was nice looking when you entered the door. It was quite small.

40 Q You read the advertisements and, of course, the first ad made no difference to you but the second ad, you forthwith went out in January and you were impressed that it was a very nice business. What gave you reason to believe that? Was it from your observations?

I will try to help you out. I don't know what was in your mind but we would like to know. A It was very clean, very neat.

Q But it was a very good business and the fact that it was clean or neat would not necessarily make it a very good business, would it? A No; but it looked nice when you went in the door.

Q There were people there, were there not? A Yes; a few people.

Q You watched the customers come and go, did you not? A Yes; for a few minutes.

Q As a matter of fact, you sat there and ate so as to see the volume of business? A I did later, yes.

Q That would be about the way one would determine whether or not a business would be a good business, is that not the case?

THE COURT: Do you understand the question or do you want it read?

THE WITNESS: I think what you want me to say is that I observed that it was a nice place.

BY MR. POKRASS:

41 Q Yes, how you would determine whether it was a good business. My question was directed along these lines: Isn't it that one would observe the business, watch the amount of business that was done, the amount of traffic and hence come to a conclusion based on those observations? A Yes, and my conclusion at that time was that it wasn't worth the price that was being asked for it.

Q It wasn't worth the asking price which at that time, I believe, was \$25,000, is that right? A No, it was more than that.

Q I think the first ad states it is \$25,000. A \$25,000.

Q When the third ad appeared and the price was reduced to \$20,000 that, of course, was more impressive to you, was it not? A I think you misunderstand there.

* * * *

42 Q In fact, you just read two ads and the third was read to you, is that correct? A The third ad was read to me and when the paper came that night, I did refer to it and saw that the ad was inserted in the paper.

Q Let's get this straight: Is it not a fact that the first ad called for an asking price of \$25,000? A If that is what it says in there.

MR. INGHAM: I think the exhibits themselves show that, your Honor.

MR. POKRASS: The witness is testifying she read the advertisement.

BY MR. POKRASS:

Q Is it not a fact that the second ad, the one of March 4, 1948, had a reduction to \$20,000? A That is right, yes.

Q Wasn't it a fact that the \$20,000 figure induced you to enter into the contract of purchase? A May I go into the conversation?

THE COURT: You can answer yes or no and then explain your answer.

43 THE WITNESS: Yes.

THE COURT: Now you may explain.

THE WITNESS: Mr. Lambros called me up and said that he was inserting the ad in the paper; that the business had been reduced to \$20,000 on account of the health of Mrs. Christakos and also Mr. Christakos and he wanted to know if I would be interested. I said I am interested

to talk with you about it anyway so my son and myself went down to talk to Mr. Lambros about it.

Mr. Lambros reiterated his statement about the daily sales volume being \$250 a day and about the monthly net profit being \$2,000 and then he said that he had thought so much of it himself that he had inspected it and investigated it with the idea of a friend of his and himself buying it and taking over the business and—

THE COURT: You are going a little beyond the scope of the question now.

THE WITNESS: May I just say one thing further? I informed him then that I was not in the restaurant business and if a person without any knowledge of it could take over a business like that and run it successfully—

BY MR. POKRASS:

Q You felt if it was good enough for him to buy it would be good enough for you to buy? A That is right.

44 Q But actually at the time in March after this third advertisement which was read to you, you assumed that the restaurant would have the same amount of business that it had when you were there in January? A Yes.

Q Did you notice or weren't you aware that the first ad stated \$250 daily as well as the second ad but that the third one said \$240 daily? A Well, I don't think one would notice that too particularly when it had been reiterated over and over; that it could be a typographical error or an error in printing.

Q And even so, a reduction of \$10 would be practically meaningless to you, would it not? A Certainly not, but according to the statements of Mrs. Christakos' own agent, whom you would expect to be authorized to give the truth about the business—

Q All right. These are the statements then. On one

hand, they are told to you as \$250 and the other \$240 a day. Certainly you would be on guard something was wrong? A No, he never said \$240. It was \$250.

Q Let me show a photostatic copy to you of that March 4 ad. This was submitted by your counsel. A Yes.

Q It says \$240. A That is true.

45 Q When you attended the actual sale of the business in the lawyer's office, that was the first time you had ever met Mrs. Christakos, was it not? A Yes, that is true.

Q And that was the first time you ever had any conversations with her, was it not? A Yes.

Q Mrs. Christakos signed this bill of sale, did she not, in your presence? A The bill of sale—in Mr. Taylor's office?

Q That is right. A Yes.

Q And she signed as the seller of the business, did she not? A Yes.

Q And yet you testified that in March, I believe you said, that when you were on the premises of the restaurant that Mr. Christakos said that he was part owner of the business. Didn't you call that to her attention? A Why, no. One would naturally assume that one's husband was co-partner in any dealings.

Q Was that your assumption? Do you wish to change your testimony that you assumed he was the owner or that he said he was part owner, that is? A I am under the impression that he said he was.

46 Q As a buyer of a business, you expect that the owners of the business would convey the premises, do you not? A I asked about Mrs. Christakos. In fact, I had asked about the books but Mr. Christakos said Mrs. Christakos handled the books and she wasn't there.

Q We are not discussing books at this time, Mrs. Lockwood. I am trying to get at the reason why you did

not ask for the signature of Mr. Christakos when, as you testified, he told you he was part owner? A Well, I presume it is because I am not a business woman enough to have thought anything about his not having signed it.

Q You say you are not a business woman. Have you had any business dealings prior to this time? A No, not without my husband.

Q Isn't it a fact that in 1937 you were engaged in the rooming house business at 1719 Rhode Island Avenue, N. W.? A I bought a rooming house business, yes, but I never managed it and—

Q You have answered the question.

MR. INGHAM: I think the witness should be given an opportunity to answer the question fully. She said she bought one but she didn't operate it.

THE COURT: That is probably the answer, isn't it?

47 BY MR. POKRASS:

Q Isn't it a fact that in 1939 also, at 1700 Rhode Island Avenue, N. W.— A I purchased the business but you will also notice that Mr. Lockwood's signature was on it.

Q That isn't the point. You are perfectly well aware I mean as to business transactions. You are not totally taken at the mercy of anyone. That is the thing. I just didn't want you to give the wrong impression about yourself.

You also testified that you were not permitted to go through the building and I presume you meant the restaurant building, the one you purchased? A Yes.

Q By that do you mean you were not permitted in the restaurant premises or you were not permitted in the basement? A I wasn't permitted in the basement, yes. Of course, naturally I could see the restaurant. It was all in the small area there.

Q The actual business? A Yes.

Q However, you were conducted on that portion of the premises that you did see and observe? A Yes.

48 Q Did you ask to go through the premises? A

Well, that was my purpose in calling up and making the appointment ahead of time was to see—

Q I mean did you ask to go through the premises while you were there? A Yes.

Q And I believe you said you asked that of Mr. Christakos? A Mr. Christakos, yes.

Q As long as you have testified to that, all subject to proof, of course, what did he tell you? A He said that the lunch business was just beginning and that he wouldn't be able to take me through or show me the business at all; take me downstairs and for me to come back later that day.

Q Wasn't that a reasonable reply by your own observations? A No, not exactly because I had already phoned for the appointment. If I had gone up there without phoning, I think it would have been but I had phoned to make the appointment, you see.

Q What time were you there? A It was around the lunch hour. I had phoned earlier in the morning.

Q Just let's try to answer the question and we will get along very quickly and dispose of the matter.

49 You were there around lunch time. When does the restaurant do business? A Around meal time, of course.

THE COURT: I guess the Court could recognize that fact, Mr. Pokrass.

THE WITNESS: Of course, when I had started out, you see, it was around 11 o'clock but, as I said once before, due to the icy streets and they were icy, it had taken me almost three-quarters of an hour to travel from my home over to Georgia Avenue. I had to go through Rock Creek Park and it was terribly icy.

Q It was, however, a perfectly plausible and a perfectly good reason to tell you "we are about to go into

the lunch hour"— A If the lunch room had been full, I think it would have been but people had not started to come.

Q You began business on March 20, 1948, is that not correct? A That is right.

Q March 20, 1948, was the beginning of Holy Week, was it not? A Yes.

Q And you actually closed up on the 27th of that week? A That is right.

50 Q That would be on a Saturday? A Yes.

Q You did operate on the 20th, 21st, 22nd and 23rd? A That is right.

Q And at that point you had made up your mind to already return the business? A Yes.

Q When you first took over the business, you had an inventory of merchandise and supplies, did you not? A Yes.

Q When you closed up that business, locked the door, what did you have there in the premises by way of merchandise and supplies? A Well, there were some staple foods there.

Q Such as what? A Well, some canned foods downstairs in the basement.

Q This business, by the way, was closed for about eight months after that and you mean that those staples were left in the premises for those eight months? A They were left there for a short while but I removed them.

Q So actually there was none left in the premises? A Well, the only food that was on the premises when I took over was food that I had ordered the day before. At least Mr. Christakos had ordered it for me.

Q Was there any food staples or other supplies
51 that Mrs. Christakos gave you? A Absolutely none.

Q Nothing whatsoever? A None at all. I paid for

everything that was there on the premises when I took over Saturday morning.

Q There was no inventory of any nature?

THE COURT: You mean no food inventory?

MR. POKRASS: That is right.

THE COURT: No food inventory.

THE WITNESS: No food inventory, no. I thought you meant the inventory of the steam table—

BY MR. POKRASS:

Q I don't mean the fixtures. A No, there was no inventory of food. There was no food there except what I had paid for.

Q What about these supplies? A Mrs. Christakos had ordered them and I paid for them Saturday when I took over the business.

Q What I mean is was there any inventory of supplies that went with the restaurant? A No.

MR. POKRASS: That is all, Your Honor.

• • • •

Redirect Examination

BY MR. INGHAM:

Q Mrs. Lockwood, did you have any conversation with Mrs. Christakos after she received notice of the rescission of the contract? A Yes, I think I did.

Q What was that? How did that come about? A She came out to the house to see me. Is that what you mean?

Q Yes. What occurred then? A Well, she wanted to talk about a settlement of the case but I didn't discuss it with her.

• • • •

Q Did Mrs. Christakos mention to you having received a letter cancelling this contract or rescinding it?

A She came out to the house to talk about it and I think she had, yes.

MR. POKRASS: You think so?

THE WITNESS: I beg pardon?

MR. POKRASS: You say you think?

THE WITNESS: Yes, I think so.

BY MR. INGHAM:

Q Did she have such a letter with her? A No, I don't think she had it with her.

Q Did she mention any such letter? A No, I don't think so.

Q Prior to your reading the ad in The Evening Star of December 4th, had you known about the Tasty Snack Bar? A No, I had not.

Q Had you ever had occasion to be interested
54 in that business at all? A No, I had not.

Q What created your interest in the Tasty Snack Bar? A I was reading the ad and it sounded attractive.

Q What ad is that? A The ad of December 4, 1947.

Q In any of your talks with Mr. Lambros, did you ask him for the books and records pertaining to the operation? A Yes, I did. When my son and I went down to his office, but he said Mrs. Christakos had them.

MR. INGHAM: I believe that is all.

Recross Examination

BY MR. POKRASS:

Q You asked Mr. Lambros for the books and records and he told you Mrs. Christakos had them? A That is right.

Q Did you ask Mrs. Christakos for the books and records? A No, I never had any conversation with Mrs. Christakos.

MR. POKRASS: I have no further questions.

THE COURT: Let me ask you this: On the day Mrs. Christakos came to your place, without telling me anything about a compromise, did she mention anything about your having given up the business?

55 THE WITNESS: No, I don't think so. She just came out for the purpose of seeing if we couldn't compromise.

THE COURT: I don't want to talk about any compromise because, under the law, it is not possible to discuss that matter because the law favors compromises and if people try to compromise, that is not held against them and no inference can be drawn from it.

What I am asking is this: Did Mrs. Christakos say anything to you at that time which indicated to you that she knew you had given up the business?

THE WITNESS: Yes, definitely. That was several months after I had given up the business.

* * * *

THE COURT: How did she know you had given up the business? Did you send the keys back to her personally?

THE WITNESS: No, I don't think—

THE COURT: I mean did you personally know what was done?

56 THE WITNESS: I gave the keys to my attorney and I think the receiver got the keys.

THE COURT: But you didn't return them to Mrs. Christakos?

THE WITNESS: No, I did not.

MR. INGHAM: I have one further question, Your Honor.

Mrs. Lockwood, you previously testified you called Mrs. Christakos on March 24?

THE WITNESS: Yes, I did. I talked with her Wednesday.

THE COURT: Yes, I understood that. She said she

would have to see her husband and she said her husband would not let her give it back.

MR. INGHAM: You offered the business back at that time?

THE WITNESS: Yes.

MR. INGHAM: And she refused to take it?

THE WITNESS: And she refused to take it.

MR. POKRASS: What were your exact words to Mrs. Christakos?

THE WITNESS: Well, I really could not testify as to the exact words.

THE COURT: Just give the substance of it.

THE WITNESS: This is three years afterwards. When do you mean, what were my words?

MR. POKRASS: I believe it was in the week that you were operating.

THE COURT: On the 24th.

67 THE WITNESS: On the 24th, you mean?

MR. POKRASS: Yes.

THE WITNESS: I told her I was very much disappointed in the business and asked her if she would not take it back; that I was willing to lose the money if she would take it back and she said she would talk with her husband about it and after she talked with her husband about it, he refused.

THE COURT: She said he refused?

THE WITNESS: He refused, yes, to take it back.

THE COURT: Who told you he refused?

THE WITNESS: Mrs. Christakos.

MR. POKRASS: I have no further questions.

MR. INGHAM: In other words, before she could agree to take the business back, she had to consult her husband?

THE WITNESS: She had to consult her husband which led me to believe he was a partner in everything she did.

MR. INGHAM: And she specifically mentioned her husband?

THE WITNESS: That she would have to talk with her husband before she did anything or said anything and that he refused to take it back.

MR. INGHAM: Your Honor, that is all the testimony with the understanding that I can recall Mrs. Lockwood in the event it is necessary to go through the daily sales day by day.

THE COURT: I think that is understood.

58 (Witness excused)

MR. INGHAM: At this time I would like to offer the testimony of the son of Mrs. Lockwood, Edward John Lockwood.

Mrs. Lockwood has testified he is in the Armed Services and is not present and available to testify here. This is the testimony he presented at the former hearing which was between the same parties, same interests, the same questions.

THE COURT: I know something about the law of evidence and I think that is admissible. Is there any objection to it?

MR. POKRASS: As to the testimony at the previous trial?

THE COURT: Yes.

MR. POKRASS: I object to that. I think it should be done by deposition.

THE COURT: As I understood, you had the right to cross examine and did cross examine at the previous trial.

MR. POKRASS: Yes but, with all due respect to the Court—

THE COURT: I have a very firm idea about that and I think it is admissible and I will admit it subject to your objection.

MR. POKRASS: I would like that to be the case.

• • • •

59 THE COURT: I understand that this is the testimony that was taken at the previous trial in this case before Judge Holtzoff.

MR. INGHAM: That is correct, Your Honor.

THE COURT: In which he was personally present; in which he was sworn and at which the defendant had the right to cross examine and did cross examine.

MR. INGHAM: Whether he actually cross examined, I don't know.

THE COURT: I said had the right to cross examine.

MR. INGHAM: Yes.

THE COURT: Further, is there any question whether this was taken by the official court reporter?

MR. INGHAM: No, this is the transcript of the official reporter.

THE COURT: I will accept it.

MR. POKRASS: May I state the grounds of the objection so that may be clear on the record?

THE COURT: Yes.

MR. POKRASS: I except on the ground that in the first trial the testimony may not necessarily be as it has been in the second trial and, hence, the cross examination of the witness, who is now absent, in the first trial would not necessarily have to be along the same lines as the course of cross examination of the absent witness in the second trial.

60 THE COURT: Subject to my being corrected by the Court of Appeals, if you have to take it there, I think the rule is that in the same proceeding it may be admitted. Here the issues are just the same. There is a slight amendment but the issues are substantially the same.

It will be received subject to your exception.

• • • •

MR. INGHAM: It is very short.

"Edward John Lockwood,

called as a witness in behalf of the plaintiff, and being first duly sworn, was examined and testified as follows:

Direct Examination

BY MR. INGHAM:

Q Will you state your full name, please? A Edward John Lockwood.

Q You are the son of Mrs. Lockwood, the plaintiff in this case, are you not? A That is right.

Q Do you recall when your mother first became interested in purchasing a restaurant business? A I believe it was in December.

61 Q Of what year? A 1947.

Q Did you have occasion to go to that restaurant? A Yes, sir.

Q And do you recall when that was? A I believe it was in January.

Q Of 1948? A Yes, sir.

Q Were you present at any time when your mother had a conversation with Mr. Lambros concerning the business, the Tasty Snack Bar? A Yes, sir; March 4, I believe it was.

Q And where did that conversation take place? A In his office.

Q And who else was present? A My mother; that was all.

Q Do you recall any conversation with respect to daily sales at the Tasty Snack Bar?"

THE COURT: I understand your objections made to the testimony relating to conversations with Mr. Lambros but I will overrule the objections with the same understanding as previous so you won't have to make objections.

MR. POKRASS: Thank you.

(continuing) "A Yes, sir, they were \$250 a day, and there was something mentioned about \$2,000. I
62 don't know what that had to do with.

Q Who mentioned that? A Mr. Lambros.

Q Do you recall how long you were at Mr. Lambros' office? A From about an hour and a half to two hours, I guess.

Q And during that period were you discussing anything other than the purchase of this business? A No, sir.

Q Now, do you recall when the business was opened by your mother?

THE COURT: There is no dispute as to those facts, is there?

BY MR. INGHAM:

Q Did you work for your mother in the business? A Yes, sir.

Q And what hours did you work?

THE COURT: What are you going to prove by this witness?

MR. INGHAM: The declining sales during their period.

THE COURT: But we have the figures, and those figures are not in dispute.

BY MR. INGHAM:

Q When you took over the business, did you have the same employees Mrs. Christakos had? A Well, all
63 except for myself and my nephew—my cousin, I mean.

Q Did there come to your attention during the period you were there, anything concerning the manner of payroll or working the employees? A Yes, sir.

MR. POKRASS: I object to that, Your Honor. The manner of working the employees, and payroll, has no bearing.

THE COURT: The objection is sustained.

(To counsel for plaintiff) I told you before, there is only one issue in the case, whether or not misrepresentations were made.

MR. INGHAM: You may examine.

MR. POKRASS: No questions.

THE COURT: You may step down."

65 MR. POKRASS: May it please the Court, before the next witness is called, I assumed that this Deed of Trust was in evidence but evidently it isn't and I would like to have the plaintiff identify her signature.

THE COURT: You admit the signature, don't you?

MR. INGHAM: Yes.

Do you want me to put it in as my exhibit? I have already mentioned it.

THE COURT: I think it ought to go in. It is going to go in by somebody so you might as well put it in.

MR. INGHAM: Very well. That will be Plaintiff's Exhibit No. 9 in evidence.

(Deed of Trust dated March 20, 1948 was marked Plaintiff's Exhibit No. 9 and received in evidence.)

MR. INGHAM: We have accomplished something that will save the Court some time. Mr. Pokrass and I have gone over these figures that I had previously prepared and compared them with the books and found that these are the daily sales as reflected by the defendant's books.

THE COURT: Covering what period?

MR. INGHAM: I am offering them covering the period September 11, 1947 through January 1, 1948.

Those are the figures that I am primarily interested in because I take the position that Mr. Pokrass can put in the figures most favorable to him, which would be the period after January 1.

66

68

John D. Caiopoulos

called as a witness by the plaintiff, being duly sworn, was examined and testified as follows:

THE COURT: If I find we are going into a lot of details, I am going to send the case to the auditor.

Direct Examination

BY MR. INGHAM:

Q Will you state your full name, please? A John D. Caiopoulos.

Q What is your occupation, Mr. Caiopoulos?
69 A Public accountant.

Q Are you practicing here in the District of Columbia? A I am.

Q During the period covering September 11, 1947 through January 1, 1948, were you the accountant for Mrs. Belva Christakos? A I was.

Q Did you have occasion to work on the books and accounts covering the Tasty Snack Bar? A I did.

Q Did you prepare a statement of operations, profit and loss statements and balance sheets? A I did.

Q Do you have any of your work sheets covering that— A I do not.

Q What happened to the work sheets? A At the conclusion of the first trial, the attorney for Mrs. Christakos took over the accounts, maintained all the books and kept even my own office copies of all the details of the work involved.

Q So, in response to the subpoena served on you, you have no work sheets? A I have not.

Q Or copies of balance sheets? A No, I don't.
70 Q Or profit and loss statements.

I show you this book, Mr. Caiopoulos, and ask you whether or not you are familiar with that book? A Yes, I am.

Q Will you state what that book is? A It is a daily cash receipt and expenditure cash journal.

Q Will you glance through that book as rapidly as you can and determine whether, from the period of September 11, 1947, through January 1, 1948, the daily sales show a volume approaching \$250?

* * * *

THE COURT: Let's be sensible about this thing.

Has he checked these figures?

71 MR. INGHAM: We have, Your Honor, Mr. Pokrass and I. To save the reporter trouble and so she won't have to write them down, she can compare them right here. She can write them down but let her check them as he goes along and save the trouble of writing.

THE WITNESS: September 11 — \$162.50
 September 12 — \$203.57
 September 13 — \$242.72
 September 14 — \$167.30
 September 16 — \$401.65

BY MR. INGHAM:

Q Directing your attention to that, specifically, does that cover one or two days? A It covers two days.

Q That would be the 15th and 16th? A I believe so.

September 17 — \$186.41
 September 18 — \$180.31
 September 19 — \$185.21
 September 20 and
 September 21 — \$371.03

Q That was for a two-day period? A Yes.

September 22 — \$190.96
 September 23 — \$173.79
 September 24 — \$149.04
 September 25 — \$146.01
 September 26 — \$172.83
 September 27 — \$183.36

57 A

September	28	—	\$131.80
September	29	and	
September	30	—	\$329.43
October	1	—	\$185.49
October	2	—	\$155.24
October	3	—	\$171.56
October	4	—	\$208.14
October	5	—	\$168.10
October	6	—	\$165.74
October	7	—	\$143.16
October	8	—	\$153.48
October	9	—	\$160.68
October	10	—	\$173.53
October	11	and	
October	12	—	\$338.55
October	13	—	\$156.04
October	14	—	\$146.00
October	15	—	\$153.08
October	16	—	\$155.91
October	17	—	\$170.74
October	18	—	\$141.81
October	19	—	\$142.12
October	20	—	\$158.34
October	21	—	\$138.47
October	22	—	\$141.13
October	23	—	\$126.38
October	24	—	\$159.20
October	25	—	\$155.68
October	26	—	\$136.30
October	27	—	\$145.69
October	28	—	\$116.57
October	29	—	\$127.16
October	30	—	\$139.41
October	31	—	\$130.34
November	1	—	\$186.13
November	2	—	\$139.13
November	3	—	\$278.28

Q Directing your attention to that, is there any notation that that covers one or two days? A There is a notation on November 4 the business was closed.

Q Is there any indication that covers one or two days' operation, the total? A I see. November 3 was on a Monday. On November 4, there is an indication it was closed and also an indication that it covers November 5 so you would have receipts of \$278.28 covering November 3 and November 5.

November 6 — \$140.11
 November 7 — \$147.27
 November 8 — \$151.11
 November 9 — \$139.64
 November 10 and
 November 12 — \$283.95

Q There is an indication it was closed on the 11th, is that correct? A That is right.

November 13 and
 November 14 — \$292.05
 November 15 — \$174.46
 November 16 — \$135.25
 November 17 and
 November 19 — \$304.69

with the indication that on the 18th the business was closed.

November 20 — \$133.74
 November 21 — \$120.55
 November 22 — \$151.74
 November 23 — \$166.75
 November 24 and
 November 26 — \$255.57

with an indication on November 25 of the business being closed.

75 November 27 was Thanksgiving Day and the business was closed.

November 28 — \$120.68
 November 29 — \$138.79
 November 30 — \$130.41

59 A

December	1	—	\$145.30
December	2	—	business closed
December	3	—	\$134.64
December	4	—	\$124.57
December	5	and	
December	6	—	\$293.36
December	7	—	\$156.37
December	8	and	
December	10	—	\$239.25

with the indication of being closed on December 9.

December	11	—	\$132.34
December	12	—	\$136.05
December	13	—	\$150.42
December	14	—	\$123.35
December	15	—	\$119.34

December 16, an indication the business was closed.

December	17	—	\$111.96
December	18	—	\$116.77
December	19	—	\$151.05
December	20	—	\$134.71
December	21	—	\$133.20
December	22	and	
December	23	—	\$237.17
December	24	and	
December	26	—	\$167.02

On December 25, the business was closed.

December	27	—	\$186.11
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On December 28, the business was closed; and on December 29 the business was closed.

December	30	—	\$111.80
December	31	and	
January	1, 1948		\$246.37

MR. INGHAM: Mr. Pokrass, do you have the original of the balance sheets; September, October, November and December profit and loss statements?

MR. POKRASS: Mr. Ingham, everything I had I gave you at the last trial. They were never returned to me.

I might also add at this point, too, there were interrogatories attempted, notice to produce and all of that was excluded by the Court specifically. Another notice to produce the records was again made yesterday and counsel was informed of the same thing, that I not only don't have them but they were also told by the Court that they were inadmissible.

77 THE COURT: If you don't have them, you can't produce them.

What is the purpose of the balance sheet, Mr. Ingham?

MR. INGHAM: To show profit and loss; net profit.

BY MR. INGHAM:

Q Mr. Caiopoulos, I ask you if you can identify this piece of paper? A It is a statement of operations from September 11 to the 30, 1947.

Q Can you state who prepared that? A I believe I did, through my office.

Q Was that prepared from the books and records furnished to you by Mrs. Christakos? A Yes.

Q What was the net profit for the period of September 11 through September 30, 1947? A The net profit on operations was \$45.79, not taking into consideration any depreciation on fixtures.

MR. INGHAM: I offer this as Plaintiff's Exhibit No. 10.

(Statement of Operations from September 11 through the 30, 1947, was marked Plaintiff's Exhibit No. 10 and received in evidence.)

BY MR. INGHAM:

78 Q I show you this paper and ask you if you can tell us what this is? A Statement of operations for the month of October, 1947, showing a net profit of \$389.97.

Q Was that also prepared by you from the books and records of Mrs. Christakos? A Yes.

Q And the net profit was what? A \$389.97; again not taking into consideration any depreciation.

THE COURT: What period is that?

THE WITNESS: One month, October.

THE COURT: What is the significance of September 11?

MR. INGHAM: That was the opening date of the business.

I think we can stipulate that. Is that correct, Mr. Pokrass?

MR. POKRASS: Yes.

MR. INGHAM: I offer this as Plaintiff's Exhibit No. 11.

(Statement of Operations for the month of October, 1947, was marked Plaintiff's Exhibit No. 11 and received in evidence.)

BY MR. INGHAM:

Q I show you this paper, Mr. Caiopoulos, and ask if you can identify that? A Statement of operations for the month of November, 1947, which shows a net profit on operations of \$71.35; again not taking into consideration any depreciation.

MR. INGHAM: I offer that as Plaintiff's Exhibit No. 12.

79 (Statement of Operations for the month of November, 1947, was marked Plaintiff's Exhibit No. 12 and received in evidence.)

* * *

BY MR. INGHAM:

Q I show you this paper and ask if you can identify this, please? A Yes, I can. It is a general work sheet.

Q Whose general work sheet? A My own.

Q Were the figures on there taken from the books and records furnished to you by Mrs. Christakos? A They were.

Q What periods does that cover? A It covers the

month of December and it covers the profit and loss for the period September 11 to December 31, 1947.

Q From that work sheet, can you determine what the net profit was for the month of December? A Yes. It was \$260.28; without taking into consideration the depreciation expense.

Q In all of these statements, September, October, November and December, no allowance has been made for depreciation. What is the depreciation account?

80 A The reserve for depreciation on the equipment.

Q How much would that amount to for each of those months, are you able to tell? A Approximately \$40 a month.

Q In other words, the net profit for each month should be—to that net profit should be added \$40 to make a real net profit?

THE COURT: Deduct—

THE WITNESS: You deduct it to make a taxable net profit. The depreciation expense would be deducted from the net profit to determine the taxable net profit.

MR. INGHAM: I ask that this be marked Plaintiff's Exhibit No. 13 in evidence.

(General work sheet of witness showing profit and loss was marked Plaintiff's Exhibit No. 13 and received in evidence.)

BY MR. INGHAM:

Q I show you this paper and ask you if you can identify that? A Yes. It is a statement of operations for the period of January 1 to March 19 of 1948.

Q And prepared by you? A Yes.

Q From the books and records furnished by Mrs. Christakos? A Yes.

81 Q What was the net profit for the period January 1, 1948, through March 19, 1948? A \$3,150.16; including the allowance for depreciation.

Q What was the depreciation for that period? A \$227.26.

THE COURT: You mean the depreciation had not been deducted or had been deducted?

THE WITNESS: It had been.

THE COURT: I mean without the depreciation being deducted, it would be thirty-three hundred and some odd dollars?

THE WITNESS: No, without the depreciation figure being deducted; it would be thirty-three hundred—yes.

BY MR. INGHAM:

Q That is for the two and one-half month period, is that correct? A Yes.

MR. INGHAM: I offer this as Plaintiff's Exhibit No. 14.

(Statement of Operations for the period Jan. 1 to Mar. 19, 1948, was marked Plaintiff's Exhibit No. 14 and received in evidence.)

* * * *

Cross Examination

BY MR. POKRASS:

Q Mr. Caiopoulos, I want to show you Plaintiff's Exhibit No. 11—start with 10 and, to save time, I show you No. 11 and No. 12. Are these true profit and loss statements for the periods of operations as you have designated on those exhibits? A As furnished me by the books and records of Mrs. Christakos.

Q They are true profit and loss statements? A Yes.

Q How long have you been an accountant? A Ten years.

Q Isn't it a fact that these statements actually
85 show nothing more than income less disbursements?

Look at your statements. A That is correct, yes.

Q Isn't it a fact that you prepare a profit and loss statement taking inventories into consideration? A I do.

Q Then how can you tell this Court that these are

true profit and loss statements? A Because the inventory of any restaurant—

Q Let's refer to this particular restaurant now. A Because I honestly believe that the inventory figures remain stable.

Q In other words, you prepared these profit and loss statements without relation to inventories, is that so? A No, that is not so.

Q Let's take the first one. A I believe on my work sheets it sets up a valuation of the income figures.

Q Take Plaintiff's Exhibit No. 10. What inventories do you show there? A These statements do not show the value of inventory at the beginning or ending of each month but they are set up in my records.

Q You testified now this was a true profit and
86 loss statement? A Yes.

Q Yet, on the other hand, you want to testify, and properly so, that inventories should be taken into consideration so as to test true profit and loss? A If the inventory is stable between the first and the last of the month, there is no need to set that up on the statement itself.

Q I will show you, then, Plaintiff's Exhibit No. 14 and ask you whether or not you have an opening inventory on there? A I do.

Q What is your closing inventory, then, on December 31, 1947? A The same as the opening.

Q You don't have a statement for the month of December? A That is right.

Q Yet you reflect no inventories for October or November? A That is correct.

Q But you do reflect an inventory as of the close of December? A I make it a practice to set up an inventory figure on the statement itself when it is a statement combining several months rather than an individual

month. We do not take an inventory at the first of each month.

87 Q What do you mean "we don't take an inventory"? You aren't an owner of this business, are you? A No, I am not.

Q What you mean is you were never given an inventory? A I usually ask the management their approximate valuation of the inventory.

Q What did you do in this particular case? A I believe the \$479 figure was an agreement between Mrs. Christakos and myself as to the valuation in setting that up and maintained right up to the end of it.

Q I show you Plaintiff's Exhibit No. 14 and ask you if that wouldn't more approach a true profit and loss statement than these alleged profit and loss statements marked Plaintiff's Exhibits 10, 11 and 12? Which would be the more accurate? All we want is the truth. A I won't say there would be a difference in accuracy. If I were to show the beginning and ending inventory on each one of these statements, it would reflect \$479.

Q How could that be, Mr. Caiopoulos, when this statement begins as of January, 1948? A Because the evaluation of inventory was set up as of September 11 of \$479.34.

Q In short, is it your contention before this Court that a true profit and loss statement can be one
88 without showing the beginning and ending inventories? A Yes.

Q I will go further. Has this been prepared on a cash or accrual basis? A On cash.

Q So there has been no consideration given as to whether or not any of these purchases were made in 1947 or 1948 A Repeat that question again, please.

Q Then no consideration has been given whether or not any of these expenditures applied in 1947 or 1948, if these were cash, prepared on a cash basis? A That is right. You are right.

Q Now, I will ask you to identify this. A Social Security records for the Tasty Snack Bar.

Q Who prepared those? A I did.

Q Will you read to the Court the total wages as prepared by you and state the period for which that is? A From September 11 until September 30, \$1,136.25.

Q For what period of time is this? A Three weeks, it appears. Now, let me see—

Q Take your Social Security return for your first quarter of 1948. A Yes.

89 Q Your Social Security, if you please. Just look at that and I think we will save time. What are the total wages for that period? A \$2,320.48.

Q That would be the total wages as reflected, that is, as having been paid out in January, February and March of 1948? A That is right.

Q And that would be the same period of time as Plaintiff's Exhibit No. 14 covers? A That is right.

Q What are the wages as shown on your Plaintiff's Exhibit No. 14? A \$2,722.96.

Q What is the figure as you have it on the Social Security return? A \$2,320.

Q Now, it is very possible, being on a cash basis, that some of the monies that she paid in 1948 really were for 1947, isn't that correct? A Yes.

Q Because there is no adjustment? A Yes.

Q Your statements being purely on a cash basis? A That is right.

Q All right. Now, depreciation is an item that
90 Is deductible for income tax purpose, is it not? A It is, yes.

Q That doesn't in any way reflect money profits? A That is right.

Q All right. Now, can you testify whether all these figures apply to the operations of the business or whether they also embraced the building? A No; operations of the business only.

Q Operations of the business only? A Yes.

Q As an example of that, let's take your taxes. What taxes did she have to pay in the restaurant business? A Are you speaking of this particular statement here?

Q I will get to that statement, yes. I am talking about that statement. But what taxes would she have in the restaurant? A She would have Social Security; District Unemployment; the restaurant license; occupancy permit.

Q The occupancy permit is not a license, is it? That is only taken out once? A It is charged up to taxes.

Q I appreciate that, but what recurring licenses does she have? A The restaurant license itself.

91 Q How much is that a year? A \$25.

Q And that divided by 12 months, would be what? A Two dollars and some odd cents.

Q All right. What else would she have? A She would have the Social Security and the District Unemployment.

Q Supposing you look at your own records and give us the figure she would have on there. A On a three month period?

Q Yes; take your three month period—I mean referring to this one quarter—take your first Social Security. What would her share be? A Her share would be \$23.20.

Q What would the unemployment compensation be? A \$30.67.

Q Are there any other taxes that she would have? She has no A. B. C. license, does she? A No.

Q Can that be about the only tax that she would have? She might have a \$10 unincorporated franchise tax? A In 1948, yes.

Q So there is another \$10 divided by 12, which would be what? What would you say?

THE COURT: That is on a cash basis. You couldn't

figure on a dollar and something a month, could you?
 92 MR. POKRASS: That would be on a cash basis,
 yes.

THE COURT. That would be whatever month it was
 paid, wouldn't it?

MR. POKRASS: Let's assume it was \$10, the pur-
 pose being that all of this testimony is for monthly net
 profits and what I am endeavoring to do is bring it into
 a monthly category.

BY MR. POKRASS:

Q So far I have three; \$23.20, \$30.67 and \$10 which
 would make a total of \$73.87 for the quarter. A That is
 about right.

Q Yet showing you Plaintiff's Exhibit No. 14, how
 much taxes do you show? A \$228.96.

Q How would there be that difference? A I can't
 testify to that. I think I can substantiate that if I have
 the records.

Q I show you a journal and ask you to identify the
 journal. A Yes.

Q What is it? A It is a check journal or listing of
 all the checks.

Q A disbursements journal? A That is correct.

Q Could you look from January through March and
 see what you have under taxes?

* * *

93 THE WITNESS: In January, 1948, a Social
 Security tax of \$51.02 was paid. In January 1948,
 District Unemployment Tax of \$68.89 was paid.

BY MR. POKRASS:

Q Of that Social Security, only half was hers and half
 the employees? A That is right.

May I see the work sheets, please, sir?

Q I don't have any work sheets, Mr. Caiopoulos.

MR. INGHAM: These are some that were in the
 deposition, Your Honor. These are all of them, inciden-
 tally.

•

THE WITNESS: Yes; during the period of 1948, which was after the time Mrs. Christakos had sold her business, the Social Security and District Unemployment tax of \$109 was paid. It was set up in order to close the record in March of 1948 for tax purposes.

BY MR. POKRASS:

Q All of that expense was, of course, put right in that period of time? A Yes.

Q In short, some was on the accrued method
94 and some on a cash method? A I will say it was all on a cash method.

Q You say subsequent to March 19, those disbursements were made so how could you possibly reason that it would be on a cash method, those disbursements having been made in April. Understand, I am not criticizing you, Mr. Caiopoulos. We are just interested in the facts as to actually what these figures show. That is the only thing that I am talking about. A That statement shows the operations of the Tasty Snack Bar in its entirety. When I say that, I mean all receipts and disbursements for the Tasty Snack Bar.

Q It is a statement of operations? A That is right.

Q As distinguished from a profit and loss statement. That is the thing that I want you to make clear to this Court, and, as an accountant, you know the distinction? A Yes.

Q And, as an accountant, you can explain the distinction to the Court. In short, counsel has made you testify that it was a profit and loss statement. Your own headings are perfectly proper that it was a statement of operations and that is all I want you to make clear to the Court, that it was a statement of operations based on a cash basis without consideration to inventories; reflecting nothing more than money coming in and
95 money going out. A That is right.

Q And there is nothing wrong in that? A That is right.

Q What was your monthly audit charge, if you recall? A \$30.

Q \$30 a month? A Yes.

Q So, actually, the \$150 that you have here would probably be some for 1947. In other words, she paid it in 1948 to you? A Yes.

Q And also I mean you represent other restaurants. We have attorney's fees in there. Is it expected that \$280 would be attorney's fees every three months?

MR. INGHAM: I object, Your Honor. I don't believe the witness is qualified to answer that.

THE COURT: He may know what the story was here. I don't know.

THE WITNESS: I don't think so, no.

MR. POKRASS: Correct. Also I show you advertising—

MR. INGHAM: May I note an objection to the answer? Your Honor indicated if he knew what the case was in this particular case and he said he didn't think so. That is very speculative.

THE COURT: No, I think he answered the 96 question that he didn't think so. Which did you mean, Mr. Witness?

THE WITNESS: I don't think the \$280 is a normal figure for attorney's fees in the course of three months.

THE COURT: Do you know?

THE WITNESS: I can't say for certain. That is a matter of opinion.

MR. INGHAM: I don't believe he is qualified to answer. I ask that the answer be stricken.

THE COURT: He hasn't shown that he was qualified.

MR. POKRASS: How many restaurants have you been handling—

THE COURT: He can't testify what the fee would be on a basis of that sort.

MR. POKRASS: I appreciate that. I wasn't endeavoring to bring that out. The plaintiff has introduced Ex-

hibit No. 14 in evidence for the purpose of showing profit and in there they have an item of attorney's fees of \$280. That obviously is to show that as an item of expense so that the net profit that the plaintiff would expect to make would also embrace such attorney's fees and, in the course of operating a restaurant, it certainly is not reasonable to assume that that is a normal expense of the business.

MR. INGHAM: Your Honor, I think that is all very speculative. We don't know what happens in a
97 restaurant, this one or anywhere else. Mr. Pokrass' argument to Your Honor cannot convince me it might be perfectly reasonable for a restaurant to have an attorney on a \$500 a month retainer and certainly this witness doesn't know.

BY MR. POKRASS:

Q Do you know what attorney's fees Mrs. Christakos had during that period of time? A Yes.

Q All right. Do you know whether those attorney's fees embraced the operation of the business or if it was outside of the actual business; more in the nature of personal? A Well, the attorney's fees were pertaining to the business but it had no reflection on the operations. By that I mean the attorney that was retained in this particular case was retained for the purpose of taking a case involving the Tasty Snack Bar.

Q In other words, defending in this particular case? A Defending the business.

THE COURT: In this particular case?

THE WITNESS: I believe so.

THE COURT: Relating to the sale of the business?

THE WITNESS: I believe so, sir.

98 BY MR. POKRASS:

Q I also show you the advertising expense of \$383.86. A That is not right.

Q I mean the repair expense, \$383.86. That would be for approximately two and one-half months. You have taken care of her books. Does she have repair expenses

every two, and one-half months in those figures? A If you are asking if that is an average figure for a restaurant, I would say yes.

Q In other words, the repairs to the restaurant itself would be approximately around \$1,200 per year? A Yes, I have seen cases of that.

Q What is your maintenance figure here of \$361.08? A The maintenance figure, as I set it up here, is replacement of supplies. There have been many questions among accountants and Internal Revenue as to whether the supply account is an asset to the business. I have always set it up as an asset in the beginning and all charges made to the supply wholesalers are to offset or to replace the original assets. I have charged that up to maintenance.

Q That is the understanding, that you would depreciate the original assets? A No, I haven't depreciated the original assets.

Q That would be merely a replacement figure? A That is right. Maintenance would be a replacement of supplies.

99 Q Let us say on the day as of the close of the books on which you were going to prepare a statement, Mrs. Christakos were to have purchased glassware for \$200. That \$200 would still go in as an item of expense and would be handled as maintenance, is that right? A After the original account had been set up?

Q Yes, assuming that. A Yes.

Q In short, there is really no inventory taken as of what is left on hand? A Correct.

MR. POKRASS: If the Court please, evidently counsel for plaintiff and myself are stipulating that the daily sales figures on this sheet may be offered in evidence without formal proof and is evidence of the actual daily sales for the period in 1948 through the 19th of March, 1948.

THE COURT: Do you want to read them into the record?

MR. POKRASS: Yes.

10

January	2	—	\$231.53
January	3	—	\$254.81
January	4	—	\$239.48
January	5	—	closed
January	6	—	\$253.09
January	7	—	\$245.55
January	8	—	\$252.58
January	9	—	\$245.09
January	10	—	\$250.11
January	11	—	\$258.32
January	12	—	closed
January	13,		
14 and	15,	—	\$702.24
January	16	—	\$243.10
January	17	—	\$248.41
January	18	—	\$222.86
January	19	—	closed
January	20	—	\$229.01
January	21	—	\$237.45
January	22 and		
January	23	—	\$471.12
January	24	—	\$228.04
January	25	—	\$244.30
January	26	—	closed
January	27	—	\$229.73
January	28	—	\$222.96
January	29	—	\$223.25
January	30	—	\$248.58
January	31	—	\$258.03
February	1	—	\$249.28
February	2	—	closed
February	3	—	\$245.92
February	4	—	\$243.01
February	5	—	\$240.21
February	6	—	\$233.86

74 A

February	7	—	\$242.46
February	8	—	\$253.77
February	9	—	\$235.59
February	10	—	\$250.59
February	11	—	\$248.84
February	12	—	\$260.78
February	13	—	\$272.53
February	14	—	\$256.90
February	15	—	\$269.95
February	16	—	\$238.64
February	17	and	
February	18	—	\$522.59
February	19	—	\$281.37
February	20	—	\$251.11
February	21	—	\$272.57
February	22	—	\$259.35
February	23	and	
February	24	—	\$511.95
February	25	—	\$276.04
February	26	—	\$261.72
February	27	—	\$284.27
February	28	—	\$276.48
February	29	—	\$266.13
March	1	—	\$248.53
March	2	—	\$265.67
March	3	—	\$256.48
March	4	—	\$260.80
March	5	—	\$265.80
March	6	—	\$258.55
March	7	—	\$249.66
March	8	—	\$260.98
March	9	—	\$240.53
March	10	—	\$234.24
March	11	—	\$232.59
March	12	—	\$262.36
March	13	—	\$252.80
March	14	—	\$249.50

March	15	—	\$230.12
March	16	—	\$243.17
March	17	—	\$242.88
March	18	—	\$251.83
March	19	—	\$241.75

Q I have just a few more questions, Mr. Caiopoulos. You have visited the premises, Mrs. Christakos, have you not? A Yes, I did.

103 Q Do you recall being there in 1947? A Yes, I think I do.

Q Do you recall the condition of the streets? A I believe they were being repaired at the time but I cannot be certain whether it was 1947 or the beginning of 1948. I can't recall.

Q Let me try to help you this way: You were there at a time when Mrs. Christakos was in business? A Yes.

Q So that would have to be in 1947? A Or 1948. I was retained up until the time she closed.

Q You recall that the streets were torn up by Capital Transit Company? A Yes.

Q And, as a matter of fact, the Avenue was even blocked off? A That is right.

Q Do you recall the length of time that these streets were blocked off? A No, I can't.

Q You have no reason to believe that the sales figures for 1947 were untruthful, do you? A No, I don't.

Q You don't have any reason to believe that the sales figures for 1948 were untruthful, of course?

104 A No.

MR. POKRASS: That is all.

Redirect Examination

BY MR. INGHAM:

Q Mr. Caiopoulos, you stated you represent a number of restaurants? A I do.

Q Can you explain the sudden increase in the daily volume of sales for the period beginning on January 2 through March 19 as against the preceding period of September 11 through January 1, 1948? A No, I cannot.

Q From your experience, is that a normal increase? A Well, I don't think so. However, I am not familiar with the averages between 1947 or the difference between the averages of 1947 and 1948.

Q Referring your attention to the daily sales for the last few days of December, 1947, starting, say, December 24 and 26, two days—\$167.02; closed on the 25th; December 27—\$186.11; closed on the 28 and 29; on the 30th,—\$111.80 and then for December 31 and January 1—\$246.37; and then immediately on January 2 jumping to a volume of \$231.53; the following day \$254.81; the following day \$239.48; does that seem normal to you from your experience? A No, it does not.

105 MR. POKRASS: I submit that counsel is trying to impeach his own witness at this point.

THE COURT: I don't assume he is. I assume what he is trying to show is that it is padded from January on, that it was not normal.

MR. INGHAM: That was my question.

THE COURT: I don't assume he is trying to impeach the witness at all.

MR. INGHAM: Not at all. That is the last thing I want to do.

BY MR. INGHAM:

Q Getting back to the question of inventory, did Mrs. Christakos maintain a constant inventory? A Yes.

Q And maintaining a constant inventory, would there be any purpose in your reflecting that in each monthly statement?

MR. POKRASS: Object to that, if the Court please.

THE COURT: He said she maintained a constant inventory and the Court can draw its own conclusions.

BY MR. INGHAM:

Q Are you familiar with this book (indicating)? A Yes, I am.

Q That book reflects daily sales beginning January 2, 1948? A Yes.

Q To your knowledge, did Mrs. Christakos maintain any other books showing daily sales? A No, sir.

Q In other words, all of your figures were maintained from these two books that we have referred to here, is that correct? A Yes, sir.

Q And this book was opened on January 2? A Yes, sir.

Q The prior book was closed on January 1? A No, December 31.

Q Including January 1, though? A Yes, that is right.

Q I notice there is a substantial amount of space left in that book. Did Mrs. Christakos offer you an explanation in opening a new book? A I don't think that would have been necessary. In fact, I have found it a practice among businessmen to start an entirely new book each year.

Q You were asked about the statement of operations as not being a profit and loss statement. However, each one of those statements reflect profit and loss, do they not? A They do.

MR. INGHAM: That is all.

BY MR. POKRASS:

Q Let's go back into that. The statement of operations is necessarily a profit and loss statement? A Technically, yes. The statement of operations would be a statement pertaining only to the operations of the business which would more or less show the profit or loss at the end of a given period.

Q Let's assume I had a period in which I took in \$10,000 and during the course of that period, I disbursed \$8,000. What would my profit be? A You are not giving me facts on that.

Q What other facts must you have? A Whether any of that \$8,000 is capital; payment on capital items.

Q What else would you want to have? A The evaluation of any of the assets that might be depreciated.

Q Wouldn't the question of depreciation be nothing more than an adjusting entry on your work sheet? A Yes.

Q Then you really wouldn't need that from me. What else would you need from me? A To determine profit and loss?

108 Q Yes. A That is about all. Of course, that is assuming that the records were set up before you gave me those two figures.

Q In other words, if all you did was take out of my disbursements the capital goods that I had bought, then you would have a true profit figure? A You would have a cash profit, yes.

Q You mean that is how much cash I have left on hand, isn't that a fact? A Yes, that is right.

Q Yes, I guess it would be. Do you have any reason whatsoever, Mr. Caiopoulos, to disbelieve the figures in those two sales books of 1947 and '48? A No, I don't.

Q You testified that there were no other books? A That is right.

Q Are those two books fictitious? A I couldn't swear to that.

Q Neither 1947 or '48? A I couldn't swear to that.

Q You do have other clients in the restaurant business? A I have.

Q Do you know what effect Holy Week has on the income of a restaurant? A Yes, it cuts the income considerably.

Q What percentage would you say it would affect the restaurant business? A You mentioned Holy Week?

Q Yes. A That would be in the month of what—April?

THE COURT: What do you mean by Holy Week; for what period of time?

MR. POKRASS: The week before Easter is Holy Week.

THE COURT: Including Good Friday?

MR. POKRASS: That is correct, Your Honor.

THE WITNESS: I would say it could cut the operations of a restaurant by 10 per cent. Of course, that depends entirely upon the location of the business itself.

BY MR. POKRASS:

Q But you do know that it does have a cut on the business? A Yes, I do.

MR. POKRASS: I have no further questions.

MR. INGHAM: Just one question. Do you know when Holy Week was in 1948?

THE WITNESS: I can't recall.

THE COURT: The Court will have to take judicial notice of that but you gentlemen will have to help.

MR. POKRASS: The plaintiff already testified
110 to that, that she began the beginning of Holy Week.

THE COURT: I didn't understand whether she started business or ended with it.

MR. MAZZUCHI: I have a calendar here and Easter was on the 27th of March that year.

THE COURT: I will accept that statement unless you show me differently, Mr. Ingham.

MR. INGHAM: Yes. I have no further questions.

* * * *

THE COURT: What other witnesses do you have, Mr. Ingham?

MR. INGHAM: I am just checking. I believe that is going to be the plaintiff's case, Your Honor.

111 MR. INGHAM: That is the plaintiff's case,
Your Honor.

MR. POKRASS: You have no more evidence to offer?

MR. INGHAM: Not in direct.

MR. POKRASS: At this time, if Your Honor please, I would like to make a motion for a finding in favor of the defendant, coupled with a motion also to strike all that testimony regarding the subject matter of agency which has not been tied up by testimony upon which the evidence was allowed in subject to that proof.

In connection with the motion—

THE COURT: I am going to overrule your motion so far as agency is concerned.

MR. POKRASS: With regard to the bill of sale that is in evidence, I call Your Honor's attention to one of the papers which is marked "Inventory of Furniture and Fixtures and Equipment of Tasty Snack Bar, 4300 Georgia Avenue, N. W., Washington, D. C." taken by Belva Christakos, seller and Peter Lambros, agent, and representing Mrs. Rosa Lee Lockwood, purchaser, at her request.

THE COURT: I won't hear any argument on that point. I think there is enough to indicate Gaston Company was the agent for the defendant in the case. He may have been her agent for the purpose of inventory but I think the fact the sale was made on his form and this
112 seller who had a listing with him is enough to constitute agency unless you can disprove it.

I overrule your motion to strike the testimony based on agency.

MR. POKRASS: In the bill of sale, there are eight covenants, seven of which apply to the seller, the defendant in this case and only one which applies to the plaintiff in this case. Reading from that bill of sale, it provides that "the purchaser covenants and agrees that

the Nicholas J. Gaston Company, their agent or servants has made no representations as to the volume of sellers business, profits or as to the value of the equipment or assets herein sold to her and further that the purchaser relies on her independent investigation in the execution of this agreement."

As the Court of Appeals has decided because of that clause, as the lower Court has held, the burden of proving fraud in this case is upon the plaintiff and the Court of Appeals referred to the fraud as laid down in the case of *Public Motor Service v. Standard Oil Company of New Jersey*. I am sure Your Honor is familiar with that case but applying the rule as laid down in that case the burden of showing—now we are going back to the advertisements—that the defendant had knowledge of those advertisements and there was an attempt to deceive having knowledge of those advertisements. That is the rule that was laid down in that case in order to show fraud on the part of the defendant.

113 There has been no testimony whatsoever that the defendant even knew of the existence of this advertisement. As a matter of fact, the testimony by the plaintiff herself was that the defendant never entered the picture until the actual date when the contract was drawn up and at no time did the defendant make any representations of any nature whatsoever to the plaintiff.

THE COURT: Wouldn't she be bound by the representations of her agent?

MR. POKRASS: She would be bound by the representations of her agent, that is correct, providing those representations misled the plaintiff into doing something which she otherwise would not have done and, in doing so, she acted to her own detriment.

Along those lines, Your Honor will recall that I asked the plaintiff distinctly if she bought as a result of the December 4 advertisement and she said no; she only bought when the price was reduced \$5,000 and she bought

because at that time she thought, and she so testified, that if the business was good enough for the broker or the agent or the salesman, whoever he was, to have considered it, it would be a good business for herself. She bought because of his opinion of the business and not because of what he had said. She testified she did not buy because of the representations or even the advertisements.

Now, we come to a very important issue of law.
114 After all, this is a suit for rescission and one of the elements to rescind must be that this business must be tendered back to the seller so as to restore the parties to their status quo.

The testimony of the plaintiff was that she asked Mrs. Christakos if she would take back the business and she replied that her husband refused to take it back. That, Your Honor, is not tender. Tender would be an offer of the keys to the place of business and I dare say if that had been done, we would not be here today.

The business has been closed all that period of time. No tender of any nature whatsoever, but merely a suit filed for rescission. The very element of rescission is that there must be this valid tender.

Also, there has been no statement whatsoever by the plaintiff of her profits during the period of her operations which would disprove the advertisements. All that the plaintiff has endeavored to show was what the profits were of the defendant; showing nothing about the profits of the plaintiff. For all we know, the plaintiff's profits might even have met the profits of the defendant.

We cannot conjecture at this point what those profits may have been so, all in all, when we sum this up, there is no fraud proved on the part of the defendant, particularly the fraud as laid down in the case of *Public Motor Service Company v. Standard Oil Company*.

115 There has been no rescission. There has been no tender back so as to even lay the basis for a suit for rescission.

And one other thing. The advertisements didn't even induce the plaintiff to buy because, by her own testimony, she said that she didn't buy as a result of them. Another thing is and the question was even asked, "Did you ask Mrs. Christakos for the books", after she was told by Mr. Lambros that Mrs. Christakos had the books. Evidently the books were important in her mind because she asked Mr. Lambros for them but she did not ask Mrs. Christakos for them so even there, there was no fraud there. There was no effort to conceal anything. The books that are here in Court today would have been the very same books she would have had on that date.

So, all in all, we feel, as a matter of law, the plaintiff has not sustained her case in order for this matter to proceed any further.

THE COURT: Mr. Ingham, what do you have to say about the matter of rescission?

MR. INGHAM: If Your Honor please, I feel from the testimony of Mrs. Lockwood that constituted a sufficient tender when she called Mrs. Christakos on the 24th of March and tendered back that business, asked that it be restored to the status quo and that tender was refused, that that constituted sufficient tender under the Uniform Sales Act.

THE COURT: Do you think that was a tender?

116 MR. INGHAM: Yes, I do, Your Honor.

THE COURT: Asking her if she would take it back?

MR. INGHAM: Yes, Your Honor. That then was followed by a suit which was filed.

THE COURT: Of course, that is the part that I was wondering about, whether or not the suit itself was not a rescission.

MR. INGHAM: That is the position I take, Your Honor, that the suit filed within five days after that tender by the plaintiff, a suit to rescind in which we ask that the Court place us in status quo. If Your Honor

considered there was some weakness in the original tender by Mrs. Lockwood, that was corrected certainly by a suit which, in its very nature, asked this Court to rescind the contract, cancel the chattel deed of trust, asked for the appointment of a receiver, and so forth, and that certainly is sufficient tender for rescission.

THE COURT: I think I had better take the testimony of the defendant in this case, particularly in view of the happenings in the previous trial. I think I had better have all the testimony. I think, unless it is a very clear case, the entire testimony should be before the Court so the Court of Appeals can dispose of the case in its entirety.

I will overrule your motion.

* * * *

120 MR. INGHAM: If Your Honor please, I would like to move to reopen the plaintiff's case in chief for one purpose. During Mrs. Lockwood's testimony yesterday, the question of a letter arose. I served a copy of a notice to produce on Mr. Pokrass yesterday afternoon after we adjourned.

Mr. Pokrass had seen that copy yesterday prior to trial but I had not served a notice to produce at that time. I would like to be able to take the stand to show that such a letter was sent to the defendant.

MR. POKRASS: May it please the Court, I object to this because the plaintiff's case has been closed. We have made two motions in the case and we have argued the motions and now it is going to develop along another line of testimony which might require another continuance to get other witnesses.

As to this notice to produce, that was left in my office and which I saw this morning. We have no such letter. We cannot produce that which does not exist. I have the complete file—

THE COURT: Let me understand what happened

with regard to that letter at the previous trial. Was there a motion to produce made then?

MR. INGHAM: The issue of whether or not such a letter had or had not been sent was never raised.
121 There never was a question of valid rescission, in other words, a tender back which was rejected. Even the answer filed in this case by the defendant makes no denial of that letter.

In our complaint, we say that a letter dated March 25, 1948, had been sent to the defendant in which tender of the rescission of the contract was made, tendering back the business upon repayment of the \$9,000. That was not an issue in the previous trial. Apparently for the first time it became an issue yesterday.

It was yesterday afternoon the letter seemed to become an issue although the testimony at the time Mrs. Lockwood was on the stand indicated that such a letter was in existence. I think, therefore, we should, for the Court's benefit as well as all of us, see what that letter is.

THE COURT: I don't think I should fail to reopen the case because the plaintiff had rested. If there is any injustice done the defendant, I would give him time to produce any other evidence he wants but I will reopen the case for that purpose.

MR. INGHAM: I might say I did show counsel this letter yesterday.

MR. MAZZUCHI: If Your Honor please, we have witnesses here.

THE COURT: You have only got Mr. Taylor, if you want him excused.

122 MR. MAZZUCHI: I have no objection to his remaining.

MR. TAYLOR: My only problem is that I am on a case before Judge McGuire and I understood I was coming down here to testify and then leave.

THE COURT: What I will do is to take the testimony of Mr. Ingham later and allow Mr. Taylor to go

on at this time, if you decide not to stand on your motion; Mr. Pokrass.

MR. POKRASS: Very well, Your Honor.

THE COURT: Then we can continue with that after we get rid of Mr. Taylor, if that is what you want to do.

MR. POKRASS: We will do that but, of course, we still reserve the right to argue the question of a valid rescission.

THE COURT: Yes. Let's have it understood that Mr. Taylor's testimony is taken because of convenience to him as a member of the Bar and you can later introduce it, as you wish. I don't mean you have to introduce it, if we go ahead.

MR. POKRASS: I understand, Your Honor.

THE COURT: You understand, Mr. Ingham, if he desires to stand on his motion the fact that we are taking Mr. Taylor's testimony now is not going to prejudice his right.

MR. INGHAM: Yes, Your Honor.

Thereupon,

Francis W. Taylor

123 called as a witness, being duly sworn, was examined and testified as follows:

Direct Examination

BY MR. MAZZUCHI:

Q State your full name for the record, Mr. Taylor.

A Francis W. Taylor.

Q What is your occupation, Mr. Taylor? A I am a lawyer.

Q Did there come a time, in March of 1948, when you drew a bill of sale for Belva Christakos and Mrs. Rosa Lee Lockwood? A Yes.

Q I show you Plaintiff's Exhibit No. 8 and ask you to identify that paper. A These are the papers.

Q These are the papers that you drew incident to the purchase of this business by Mrs. Lockwood from Mrs. Christakos? A Purchase and sale, yes.

Q Do you recall whether there was a conference prior to the drawing of these papers? A I had never met either of the parties. As a matter of fact, I did not know either Mrs. Christakos or this young lady.

Q Who called you in to draw these papers? A Mr. Lambros of, I think it is, Gaston & Company. They were business chance brokers.

124 Q Did these people come to your office to sign these papers? A Yes. I think it was on Friday because I usually conducted the settlements on a Friday and it was scheduled either for 2:00 o'clock or 2:30. Mr. Lambros arrived first and Mrs. Christakos second.

MR. INGHAM: I suggest the witness confine himself to the question. He asked whether or not a conference was had before,—

THE COURT: I think this is a proper answer.

THE WITNESS: Then Mrs. Lockwood came in. Mrs. Christakos was accompanied by a man—I know it wasn't Mr. Christakos but from my recollection he was the auditor for Mrs. Christakos.

THE COURT: Is that as far as this question goes? You asked what happened.

BY MR. MAZZUCHI:

Q I will tie it in. I wanted to get the parties there.

A Mrs. Lockwood, and I recall her son was present.

Q Her son? A They arrived last.

Q Can you give us, from your best recollection, what happened during this conference in your office prior to the signing of these papers?

125 THE COURT: At which all parties were present?

BY MR. MAZZUCHI:

Q At which all parties were present. A Promptly

upon the arrival of all the parties, copies of the agreement were distributed to all the parties to read.

Q All the parties present received a copy of the agreement? A That is right.

Q Then what happened? A They read it. Then each portion that was questioned was explained to each one of the parties. If there was a doubt as to any meaning of the words, it was explained.

Q Did you read the contract aloud? A No, I don't recall that I read it aloud. It never had been my practice to read it aloud. I merely gave the copies to each one to read.

Q Were there any questions concerning any paragraphs in the contract, if you recall? A When I prepare the papers, of course I was given the original sales contract or contract of sale between the Gaston Company and Mrs. Lockwood and Mrs. Christakos. I have a paragraph that is inserted in the contract which has to do with the last paragraph here where "the purchaser cove-
nants and agrees that the Nicholas J. Gaston Company,
their agent or servants has made no representa-
126 tions as to the volume of sellers business". That
paragraph was explained as to what it actually
meant.

Q Were there any conversations in that room during that conference between Mrs. Christakos, the seller, and Mrs. Lockwood, the buyer? A Well, the conference started about 2:00 o'clock or 2:30 and it wound up about 6:30. There had been considerable discussion about it. It was before the contract was actually signed.

I recall—and I recall because—well, I was supposed to be a witness in the last case about it and other things because Mr. Aquino and I were present—that Mrs. Lockwood appeared to have had no experience in the particular business that she was engaging in and from the conversation it appeared that she had borrowed the money on her home to make the purchase and, while I had no

particular interest in either Mrs. Lockwood or Mrs. Christakos as far as representing anyone was concerned, I inquired or in a general discussion learned that she intended to have her son and someone else, a young man—I don't know whether he was 21 or was close to it—but he was a very young boy and I had asked what experience he had had and it appeared that he had had two or three days experience or a week's experience with People's Drug Store and it seemed to me at that time that it was a very dangerous purchase on her part
127 with such little experience—

MR. INGHAM: Object, Your Honor.

THE COURT: Yes, I will strike out what appeared to him. Just state what was said, Mr. Taylor.

THE WITNESS: I told Mrs. Lockwood—there was some discussion as to the help up there—and I told her she should go very carefully on the dismissing of the help that was running the operation and relying on the experience of these two young men that she had intended to use in the business but she didn't seem to be concerned with that particular proposition.

This agreement was not signed immediately when they went in there. There were discussions about the experience and Mrs. Christakos was reluctant to go into the sale of it because of Mrs. Lockwood's intention to use these young men and Mrs. Lockwood was actually insisting that the contract be consummated.

BY MR. MAZZUCHI:

Q In other words, Mrs. Christakos was reluctant to proceed with this sale when she realized the inexperience of the people? A That was my reaction.

Q And she wouldn't sign the paper immediately? A No, the papers were not signed immediately.

Q Was Mrs. Lockwood insistent that the deal
128 go through? A Yes. Well, I would say she really intended that it should go through.

Q Were there any questions by Mrs. Lockwood of Mrs. Christakos as to daily gross receipts or net profits? A I definitely recall that there was no such conversation about volume of business. That paragraph that I referred to particularly covered that particular subject and it was not raised.

Q And that is one that you had explained? A That is right.

Q Particularly at the time? A Yes. She was to take possession, as I recall, the next day. This was a Friday. There was one other conversation—this was before the thing was signed—that Mrs. Christakos inquired of Mrs. Lockwood as to what plan she had made to buy the merchandise for the next day's business or the weekend business and Mrs. Lockwood had said that she had made no arrangement whatever and then Mrs. Christakos said that that was not the proper way to operate a business; that she would not make anything of it if she did it that way.

Q But, in spite of this, Mrs. Lockwood insisted on the deal going through? A Mrs. Lockwood signed the contract, yes.

MR. MAZZUCHI: You may examine.

129

Cross Examination

BY MR. INGHAM:

Q Mr. Taylor, who were you representing at this conference? A I don't know that I was representing anyone. I was retained to write up the agreement by Mr. Lambros of Gaston Company. I had never seen—

Q Who paid you? A I think I got my fee from Mr. Lambros but if it is my recollection, both sides paid a portion of it.

Q Do you recall what fee you got? A I think it was \$60.

Q Was it a settlement or were you retained by the

parties as attorney? A It was just a settlement. I didn't even know the people.

Q Do you settle many real estate transactions? A At the particular time in 1948, I was settling quite a few of them.

Q Were they real estate transactions? A I will withdraw real estate transactions. It was strictly business chance brokers.

Q Were you handling most of Gaston Company's? A I think I handled—

MR. POKRASS: Object to that, if Your Honor please.

130 THE COURT: I think it is admissible.

THE WITNESS: I think I handled about three transactions for Gaston Company—for Mr. Lambros.

BY MR. INGHAM:

Q For Lambros? A Of Gaston Company.

Q That was your connection with Gaston Company, through Lambros? A Those were the only papers I ever handled for Gaston Company.

Q This paper was prepared in your office? A That is correct.

THE COURT: Referring to—

MR. INGHAM: Exhibit No. 8.

THE WITNESS: That is right.

BY MR. INGHAM:

Q Was this prepared while all the parties were in your office? A No, the papers were all ready.

Q Do you recall when these papers had been prepared? A Either the day before or probably on a Wednesday.

Q Who gave you the information with respect to the cash and the deferred payment and so forth? A Mr. Lambros gave me a copy of the form that they used.

131 Q Is this a standard form of bill of sale that you use? A That I use?

Q That you use. A That is right.

Q Who requested the insertion of the last clause in this exhibit? A Mr. Lambros.

Q Mr. Lambros? A And I have always done that.

Q May I ask what the purpose of that clause is? Isn't it a little unusual on an open-hand deal that you waive your right to complain of any representation? A The purpose for which I put it in is to put on record all of the transaction. I didn't know at the time but Mrs. Lockwood had been up there a few days,—

Q Had been up where? A At the place of business.

Q You mean operating it? A I don't know what she was doing. Only in the conversation I learned that she was up there observing it, I assume.

Q Was that a few days just prior to the execution of this bill of sale? A Yes, because that was developed—

Q That was developed at the conference? A 132 At the conference.

Q Do you recall how many days she was there? Was it one, two, three, four? A I can't recall the number of days but she had been there because evidently she had come from there.

Q Did you get the impression she had spent a full day up there or several full days observing the operation? A I knew definitely she had been there that day.

Q Did you get that from Mrs. Christakos or Mrs. Lockwood? A I guess I got it from the whole conversation between the parties. I had never had a conversation with Mrs. Christakos even before the young lady came in because Mr. Lambros' wife had just had a baby and they were discussing that.

Q Who was discussing that? A Mrs. Christakos and Mr. Lambros, in my presence.

Q Did you observe much conversation between Mrs. Lockwood and Mrs. Christakos? A Mrs. Lockwood was not present when we were discussing about the baby. Then she came in and we discussed the contract.

Q Who asked you to explain the final clause in the bill of sale? Was that Mr. Lambros? A I think Mr. Lambros asked me to explain it to both of them.

Q Did he say why? Was there anything unusual about this purchase? A No, because I had always put that provision in there and I had always explained it to the buyers and sellers.

Q You handled quite a lot of these business transactions at that time, didn't you? A That year, yes.

Q Isn't it rather unusual that no representations are made as to daily sales and net income from a business? A Well, I don't say that is not so because, in some contracts, those representations are embodied in the contract but there was no such request, nothing like that done in this particular case. There was no discussion about volume of business in any conference that I attended.

Q There was no discussion then? A No.

Q From your experience as an attorney, Mr. Taylor, isn't it unusual for someone to go in and purchase a business without being given any information with respect to sales or what the business is worth? A Well, I have seen some mighty strange things done.

Q As a general practice—

THE COURT: That question called for his experience in previous cases, what is customary. That is a matter of argument rather than anything else, I should think. I guess we have all seen strange things in contracts.

134 BY MR. INGHAM:

Q Did you ever have a Mr. Walker associated with you at the time this transaction took place, in the next office? A Mr. Aquino.

Q Was he present at this conference? A He was not in the office, right in my office. The door was probably open. I know that Mr. Aquino did talk to Mrs. Lockwood.

Q And was that while Mrs. Christakos was present? A I am just going to talk about a little hearsay—

THE COURT: Then we had better not do it.

BY MR. INGHAM:

Q We had better not have the hearsay. A It was my recollection that Mr. Aquino was present when we discussed the danger of entrusting this business investment to these young people. The conference was still going on because Mr. Aquino does not stay down at the office until 6:30 and the discussion, I think, was either out in our outer hall and it was, as I narrated, that she should go along very carefully if she went into this.

Q Mr. Taylor, other than handling settlements, did you represent Gaston Company? A No, sir.

Q Did you represent Mr. Lambros? A No, sir, I never represented Mr. Lambros legally in my life-
135 time.

Q You considered yourself sort of as a quasi—you didn't give legal advice? A No.

Q But the final clause was inserted in the form? A It was part of my form.

Q And suggested by Mr. Lambros? A He said that he wanted that provision in there.

MR. INGHAM: No further questions.

THE COURT: Do you recall from whom you got the check for your services or cash, however you were paid?

THE WITNESS: It is my recollection, Your Honor that I got a check from one or cash from the other or cash from both. I mean it was paid by both of them, as I recall. It was not paid by one or the other. It was split.

THE COURT: Was it paid at that time?

THE WITNESS: Yes, at the time. The transaction was complete that night.

THE COURT: Including your fee?

THE WITNESS: That is right.

MR. MAZZUCHI: No further questions, Your Honor.

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136 THE COURT: Mr. Pokrass, I have concluded to let Mr. Ingham testify in the plaintiff's case.

MR. POKRASS: Yes. May the record show an objection?

THE COURT: Yes.

137 Thereupon,

Stephen G. Ingham

being duly sworn, testified as follows:

THE COURT: You understand that if you feel you are in any way prejudiced, Mr. Pokrass, by my allowing him to reopen the case, I will give you time to remedy that situation.

THE WITNESS: Mrs. Lockwood came to see William E. Furey and myself on March 25 for advice concerning the Tasty Snack Bar.

MR. POKRASS: At this time I am going to object. All of this is going to be hearsay. It is out of the presence of the defendant.

THE COURT: He is not stating conversation.

Anyway, she came to see you on the 25th of March—period.

THE WITNESS: That is right. As a result of that visit, I wrote this letter to Mrs. Christakos dated March 25, 1948.

MR. POKRASS: I object to that reading. If it is a document it should be offered in evidence.

THE COURT: Let's do one thing at a time. I assume he is going to proceed in the regular order. I can't take your objection until he offers it.

THE WITNESS: It is a letter dated March 25, 1948, addressed to Mrs. Belva Christakos—

MR. POKRASS: I object.

138 THE WITNESS: I am not reading it. I am just identifying it.

I want to offer it as Plaintiff's Exhibit 15, I believe.

MR. POKRASS: I object to that immediately.

THE COURT: Just one minute.

You have got to tell us before it would be admissible, Mr. Ingham, what you did with the letter; what effort you made to have the original produced.

THE WITNESS: If Your Honor please, I typed that letter myself and that is a carbon copy of the original. I can identify it as having been typed by myself because I used my initials and a small "m". Why I typed it, I don't know. Possibly one of the girls was out of the office at the time.

The original of this letter I mailed myself, put it in the mail box to Mrs. Christakos. Yesterday I served notice to produce on Mr. Pokrass, leaving a copy at his office—

THE COURT: At what time?

THE WITNESS: Approximately 4:30.

THE COURT: Is this the notice to produce?

THE WITNESS: That is the notice to produce, Your Honor, and a copy of this letter was attached to that motion.

THE COURT: Did you deposit it in the United States mail?

THE WITNESS: According to my best recollection, I did because I typed it and apparently no one else was in the office at the time. The way I identify a letter that I type, I use my initials "SRI" with a small "m". When any girls type a letter, they use their initials.

THE COURT: I will admit the letter, or a copy of the letter and give you an exception.

(Letter dated March 25, 1948 to Mrs. Christakos was marked Plaintiff's Exhibit 15 and received in evidence.)

THE COURT: Is that all?

THE WITNESS: Yes.

• • • •

MR. INGHAM: I have one more question I would like to ask Mrs. Lockwood with respect to this letter.

MR. POKRASS: That is the whole point. Plaintiff's case is being reopened because of a legal argument that was presented at the close of the plaintiff's case. There has been no issue of tender at any other time except a purely legal argument.

THE COURT: There was in the complaint a definite statement of tender. In one paragraph here, as I
140 recall it, of the original complaint, Paragraph 5, it is stated because of misrepresentation, a breach of warranty by letter of March 25, 1948, plaintiff notified the defendant, Belva Christakos, that she rescinded the contract and tendered back the business on refund of the \$9,000.

MR. POKRASS: That, Your Honor, is an allegation—

THE COURT: I don't think you can be too surprised that there is going to be evidence of tender.

MR. POKRASS: No, it is about this particular letter and if I can take the stand for the purpose of discussing that letter, the Court can see it is the plaintiff's inability to produce, not the defendant's.

As a matter of fact, before this trial began, I asked counsel for plaintiff for the original letter of tender because I wanted to refresh my memory about it. He looked through his files and he could not find it. He knew I did not have it because I asked for it in the first place and I saw that copy. He said, "Well, I ought to have the original somewhere. Maybe it is in the original file."

That is the only reason I am objecting, because he has placed me in the position of having a document that I am withholding from the Court.

THE COURT: No—

MR. POKRASS: And by a notice to produce a document that he knew well in advance, for at least 24
141 hours, that I never had.

THE COURT: Mr. Pokrass, you know to lay the foundation for secondary evidence, he has to show he exhausted his search for the original and if it is a letter addressed to another party, he has to do it by a notice to produce. I certainly got nothing offensive out of his statement in regard to you.

MR. POKRASS: I am glad you did not because I did.

MR. INGHAM: I can't understand that.

THE COURT: I am sure we have the highest regard for Mr. Pokrass.

MR. INGHAM: I do.

THE COURT: I take it that what he did was simply to go through the formalities. Certainly I did not get the impression he was making any attack upon the integrity of Mr. Pokrass and it would be very hard to give the Court that impression.

However, I will let him take the stand, if he wishes, on this point without prejudice to his right again to rest without offering any evidence.

MR. INGHAM: May I make one further comment on that, Your Honor? In addition to showing Mr. Pokrass the copy of the letter yesterday—I knew he had gone for the day when the young man from my office left the notice to produce—I called Mr. Pokrass at his
142 Home last night so he would not be taken by surprise.

I do not say Mr. Pokrass has the original but I could not possibly have it. Other counsel were in this case before Mr. Pokrass was retained. There was a large volume of pleadings filed by other counsel. It is possible the other counsel did not turn the letter over. I don't know. I have no way of knowing but I had to serve that in order to get my copy in and I did call Mr. Pokrass last night at home.

THE COURT: Mr. Pokrass has told us he didn't have the letter and I am sure he doesn't have it. If he wants to take the stand, he may take the stand.

MR. POKRASS: Under those circumstances, I won't take the stand.

THE COURT: What is the purpose of your recalling the plaintiff?

MR. INGHAM: It is in connection with this letter, Your Honor. She has a written memorandum made at the time of the transaction in her daybook concerning this particular letter.

THE COURT: I think that would be entirely improper so I won't let her be recalled.

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143

Belva A. Christakos

called as a witness in her own behalf, being duly sworn, was examined and testified as follows:

THE COURT: I take it Mr. Taylor's testimony is in the record.

MR. MAZZUCHI: Yes, Your Honor.

MR. POKRASS: Yes.

Direct Examination

BY MR. MAZZUCHI:

Q State your full name, please. A Belva A. Christakos.

Q Mrs. Christakos, what has been your general occupation in the last five or six years? A Restaurant business.

144 Q How long have you been in the restaurant business? A Since 1930.

Q Did you, in March of 1948, own the Tasty Snack Bar? A Yes, I did.

Q Did there come a time in March, 1948, when you sold the Tasty Snack Bar? A Yes.

Q Do you remember the person to whom you sold it? A To Mrs. Lockwood.

Q When was the first time that you met Mrs. Lockwood? A At Mr. Taylor's office the day of the settlement.

Q Do you recall what that date was? A March 19, 1948.

Q Do you recall who was present at the office of Mr. Taylor on this occasion? A Myself and Mr. Caiopoulos, Mr. Lambros and Mrs. Lockwood and her son was all.

Q And Mr. Taylor? A And Mr. Taylor.

Q Tell us from your best recollection, Mrs. Christakos, part of the discussion or the discussion that took place in Mr. Taylor's office? A Well, Mr. Lambros was quite excited. His wife had had her first baby that
145 morning and he failed to introduce me to the lady who was buying my store, so I introduced myself and I said, "Are you the lady who is purchasing the business?" She replied "Yes". I said, "Is this your son?" And she said, "Yes, this is my son Jackie" and I think maybe Mr. Taylor must have passed the papers around for us to read.

Then I asked Mrs. Lockwood what her experience was in the restaurant business. She said she had no experience in the restaurant business.

* * * *

A She said she had no experience in the restaurant business and that she was going to depend on my employees until such time as her son, Jackie, learned the restaurant business. So I said, "Well, Mrs. Lockwood, you know you don't learn the restaurant business overnight. It is going to take a considerable length of time and because of my husband's health and not being able to rely on my employees, is my main reason for selling the restaurant business.

Q What did she say as to how she was going to operate this business? A She just stated that, she says, "Well, I don't intend to stay in the business at all times" and she said Jackie has got to learn the business.

So I, in turn, asked her son what experience he had had in the restaurant business and he said he had worked 145-A a couple of days, I think it was a couple of days in the Peoples Drug store about a year previous to that and I said, "Jackie, you aren't going to be running a Peoples Drug store when you buy a restaurant business. I said it is altogether different and I brought to his attention you have to know how to cook, you have to know how to buy and cut meat, you have to know how to hire your employees and everything that goes with a restaurant business. She said, "Well, he will just have to learn."

I explained to her, I said, "Mrs. Lockwood, you aren't only going to buy my business but you are also going to be my tenant and in order to have an experienced man in there, he must be experienced in order to pay the rent and be able to meet the note on the purchase of the business and it went on from there.

It was brought up several times and I just didn't like to see her buy the business, not having any experience, as I had requested from the agent, that it must be an experienced operator.

Q Did you suggest or were there any suggestions that this deal might be called off? A Well, I told Mrs. Lockwood there that I understood from the agent, Mr. Lambros, at the time of the signing of the acceptance of the contract on a deposit, that she had two sons and two nephews and that they were going to occupy the apartment which is above the store and that they 146 were in business some place in Baltimore working and they wanted the apartment and I, in turn, gave my tenants the necessary notice they should vacate because I was told they needed the place.

So the time for the settlement took such a long time that about, I guess, maybe three-quarters of an hour or an hour before the settlement was finally ended, she said, "Mrs. Christakos, if you are intimating to me that you

don't intend to sell me this business, I demand my money double", so then I went into a little thinking and there was nothing else for me to do.

Q In other words, you intimated that possibly she was not the right person to buy this business and suggested that you ought to withdraw because you were the landlord as well as the seller of the business and she told you that the only way that you could back off from this contract was by returning her money double? A She didn't say anything about returning any money. She said she demanded her money double. I don't know whether she meant the amount of the deposit or the amount of the sale or what she did mean so that was about all there was to the conference or the conversation.

Q So then did you sign the papers? A Yes; after probably, say, ten or fifteen minutes they were all signed.

Q Did Mr. Taylor explain those papers? A
147 Yes, he did.

Q To all parties present? A He gave each one of us a copy to read and he asked, before the signing of the papers, if they were understood by each and every one that was concerned.

Q Were there any questions asked by Mrs. Lockwood there? A No.

Q Did Mrs. Lockwood at any time ask you any questions concerning your gross receipts, daily gross receipts? A No, that was never mentioned.

Q Did Mrs. Lockwood at any time prior to this conference ask you a question about gross receipts? A No, I never had seen her before.

Q When did you open this restaurant for business, Mrs. Christakos? A September 11, 1947.

Q Did anything unusual occur with respect to traffic conditions in front of your business shortly thereafter? A Well, in October, about the 20th or 24th of October, they began putting in a new carline from about, I believe, somewhere near New Hampshire Avenue or Quincy

Street, probably and took it all the way on up to Crittendon Street which was about two, two and one-half blocks above me. Kansas Avenue crosses there just below my store at Upshur Street and Taylor Street 148 where they all come in with Iowa Avenue and 9th Street and they used the little park and back of the Petworth Library for a garage or parking space.

Q For the equipment? A And all the big machines they used there.

Q Was the street torn up in front of your place? A Yes, the street was blocked for, say, four or five blocks.

Q Was your store easily accessible? A My store was practically closed in.

Q Did that affect your business? A That affected my business, I would say, maybe \$400 a week.

Q When did they finish this street work? A The job was completed the last week of December of that same year, 1947.

Q Did you notice any change in your business as soon as the job was completed? A Well, yes. The street was open and the people were getting acquainted with the place and business got back to normal.

Q Mrs. Christakos, in your long experience in the restaurant business, are there periods when business falls off due to a certain time of the year? A Well, in most restaurants—yes, during the Lent period and the 149 holidays, Thanksgiving and Christmas, when they come together there we usually have to have a little ahead to carry over the slack-up in business during those particular times.

Q Has that been true during your entire experience in restaurant business? A That is right. I think it is true with everyone in restaurant business unless they had liquor or beer, probably.

Q Do you have liquor or beer in this restaurant? A No, I don't.

Q Did you have at that time? A No, strictly food.

Q Mrs. Christakos, there has been some testimony offered here concerning the sending of a letter to you. Do you recall ever receiving a letter in March of 1948, or any time after that, from the offices of Ingham and Furey? A No, I recall receiving no letters.

Q When did you have your first intimation that Mrs. Lockwood was unsatisfied or didn't want to continue with the business? A She took the place over on a Saturday, which was the 20th, the following day after the settlement and I stayed in the store—in fact, I was there from about 8:00 o'clock in the morning until around 7:30

that night and I closed out my payroll with my 150 employees. The last thing I did was to give her my \$200 change in the drawer and she, in turn, gave me a check for the amount of change I kept in the store at all times and then the next day, Sunday, I didn't go in the store and Monday morning, about 7:00 a. m., the telephone rang and I answered the phone and it was Mrs. Lockwood.

Q Where were you at that time? A At home. She said, "Mrs. Christakos, this is Mrs. Lockwood", and she at the time said she was at home. I said, "Well, good morning, Mrs. Lockwood. How are you?" And she said, "Mrs. Christakos, I am so befuddled I don't know what to do."

She said, "If I had only heeded your advice last Friday I would have been better off." And she said, "I want to ask you—and I want you to give me a 30-minute answer—will you take the store back for \$5,000 less than I bought it?"

I said, "Well, Mrs. Lockwood, what in the world is the matter? You know I can't give you a 30-minute answer, not at 7:00 o'clock in the morning. I wouldn't be able to get my attorney. I wouldn't be able to talk to anyone. I can't answer you in 30 minutes, not at this time in the morning."

She insisted that she have a 30-minute answer.

Q Mrs. Christakos, did she at that time, when she called you, give any reason for wanting to sell you
151 back the restaurant? A I asked her. I said,
"What in the world happened?" She said, "It is too big of a burden to me and I don't have the necessary funds to operate and I never dreamed it would cost that much money to operate a business."

Q When was the next time that you saw Mrs. Lockwood after that call on Monday morning following the day they took possession? A The next afternoon, which was Tuesday, she came over to my house which is a couple of blocks from the store and she asked me to go to the electric company and the gas company to make the deposits for the light and gas as I had to withdraw mine and she put hers in so I went down—I don't recall whether it was the light company the first day but we went to one and it was too late to get to the other one. It was either the light or gas we went to on Tuesday and the next day, which was Wednesday, we went either to the gas or the light company about the deposit.

Q During those trips, did she talk to you about selling this restaurant? A No. We went straight down to the company. She went down in her car and she left me out in front of the house and that was all there was to it.

Q Mrs. Christakos, incident to the operation of your restaurant business, you maintain a book in which you enter daily sales and expenditures, do you not?
152 A That is right.

Q Do you maintain a duplicate set of books or do you maintain just one book? A The only books that I kept in the restaurant or any kind of books at all was my daily sales book which is bread and milk and the necessary things that have to come in every day and they are paid for by cash in the register and the only other book I did keep was my payroll book.

Q Mrs. Christakos, I show you a book that has been introduced into evidence here as Plaintiff's Exhibit—

THE COURT: I don't think they have been admitted, Mr. Mazzuchi.

MR. MAZZUCHI: I am sorry, Your Honor.

BY MR. MAZZUCHI:

Q I ask you to identify that book. A Yes, this is the daily sales book.

Q Daily sales book of what? A Of the Tasty Snack Bar at the beginning of the operation of the business.

Q And what is contained in that book? A Just your ice and your milk and bread and pies; in other words, the things that are delivered every morning that are necessary in the business.

Q Do you enter in that book the receipts? A Yes, I just put the amount of sales from the register and
153 deduct.

Q In other words, you enter in this book the receipts and expenses? A That is all.

Q Do you keep any other book? A No. I used to give this book once a month or when he called for it to the accountant and he used to put it in the other books.

Q I show you another book and ask you to identify that book. A Yes, that is my book.

Q What period is covered by this book? A That book is the beginning of—I believe we have January 2 here. It should be January 1. There must have been a Saturday or Sunday coming in there.

Q This is the beginning of operations for 1948, is it not? A That is right.

Q And your operations through March 19 of 1948? A Yes, that is right.

Q Is there a duplicate book with a different set of figures? A Oh, no.

Q This is the only book that you kept in the
154 operation of your business? A Yes, only I have the bills that we are supposed to keep for three years and then we throw them out.

Q Mrs. Christakos, I ask you did you at any time see or know of an advertisement in the Evening Star concerning your business? A Not until the time—I didn't see an ad until the time I went for a deposition to Mr. Ingham's office.

Q That would be after the filing of this suit? A After the filing of the suit, yes.

Q After you saw Mrs. Lockwood on the day that you went to the gas or light company, did you have any further conversations with her? A No.

Q When did you next know of any difficulties that arose by reason of this sale to Mrs. Lockwood?

* * * *

Q Let me rephrase it. Did you at any time shortly after you saw Mrs. Lockwood on the Wednesday following her taking possession receive any suit papers? A Yes, I received the suit papers.

Q When did you receive those, do you know?
155 A I couldn't tell you the date of receiving them.

Q Did you have any conversations with Mrs. Lockwood from the Wednesday you went to the gas company until you received those suit papers? A No, I did not.

* * * *

Q Mrs. Christakos, I ask you did you at any time make any statements concerning your gross income or net income to anyone? A No, I did not.

Q Mrs. Christakos, I show you Plaintiff's Exhibit No. 14 and ask you if you can identify that? A Yes. That is the statement that Mr. Caiopoulos gave me on closing out the books after the sale.

Q Directing your attention to the figures stated
156 there for repairs, \$383.86— A That \$383.86 was for a storm door I had installed in front of the place and it is the payment for material, lumber and the carpenter who bought the storm door.

Q Was that your decision to classify that as repairs or Mr. Caiopoulos'? A No; I usually let the bookkeeper keep the books however he wanted to fix them. That was the reason I hired an accountant.

Q Is that a figure from your experience in the restaurant business, Mrs. Christakos, that would recur every two and one-half or three months? A Which one is that?

Q The figure for repairs.

THE COURT: Even the Court would know that if it was for a storm door it would not recur every two or three months.

MR. MAZZUCHI: I am talking about the general classification of repairs.

THE WITNESS: It is how the equipment is or the condition of your store.

BY MR. MAZZUCHI:

Q What was the condition of your equipment in this store? A The condition of my store was a brand new store. It took me eight months to build it. Unless your refrigeration or your air conditioning or some
157 painting was required by the Health Department or some sewer work or plumbing had to be taken care of, the expenses, as far as repairs or upkeep of the place is not great. It is just according to the equipment of the restaurant.

THE COURT: Was all this equipment new?

THE WITNESS: Brand new equipment.

* * * *

158 Q - Mrs. Christakos, Plaintiff's Exhibit 14, which we have referred to, covers operations of about two and one-half months. I show you Plaintiff's Exhibit No. 10, being a statement of operations for the period September 11 to September 30, 1947; Plaintiff's Exhibit No. 11 being a statement of operations for the month of October, 1947; Plaintiff's Exhibit No. 12 being a statement of opera-

tions for the month of November, 1947. I ask you, Mrs. Christakos, to examine these and tell us whether, if these statements were multiplied by 12, every item on there, if that would fairly represent all of your expenses during the year?

* * * *

MR. INGHAM: I object to that, Your Honor. That is speculative. The evidence further shows this
159 lady only operated this restaurant for a period of nine months.

THE COURT: I think he is trying to show there are some items that are non-recurring, such as six months of heat. I assume that is what he is after.

MR. MAZZUCHI: That is what I am trying to show.

THE COURT: She may answer.

* * * *

160 THE WITNESS: By this first one, September 11 through the 30th, there is advertising \$307.75. As I recall, it was \$250 for an ad that went in the paper announcing the opening of the restaurant.

BY MR. MAZZUCHI:

Q Mrs. Christakos, you wouldn't have that as a recurring expense for 12 months of the year, would you?
A No.

Q Referring to Plaintiff's Exhibit No. 12, we go to repairs, \$103.40. That question we have already covered. We will go to gas and electric. A That varies according—

Q That would vary? A According to the weather. It is according to whether you have your different things working.

161 Q Referring to Plaintiff's Exhibit No. 14, there are taxes, \$228.96.

THE COURT: Plaintiff's Exhibit 14 covers more than one month.

BY MR. MAZZUCHI:

Q That covers two and one-half months. A No.

Q Let's exclude that question. I think that would not be a fair comparison.

In other words, Mrs. Christakos, from reviewing all of those exhibits, Plaintiff's Exhibits 10, 11 and 12, is it your conclusion that those items vary during the course of the year so that no one statement would properly reflect, if multiplied by 12, the actual expenses of this business?

A No, nothing except the trash and the exterminator.

Q Fixed expenses? A Yes, just things that happen on a contract basis.

Q Mrs. Christakos, I ask you do you, of your own knowledge, know of any representations of any kind made by any one? A No.

Q Concerning the net profits or daily sales of the Tasty Snack Bar? A No, I do not and no one would have access to that information other than myself and my accountant.

* * * *

BY MR. INGHAM:

Q Mrs. Christakos, you have stated that you have been in the restaurant business since 1930? A That is correct.

Q Have you owned restaurants before this? A Just fourteen.

Q I beg your pardon? A Fourteen and they are all operating today, every one of them.

Q You own fourteen restaurants? A No, I have sold fourteen.

Q In other words, you have bought and sold fourteen restaurants? A That is right.

Q Were they located in the District of Columbia? A That is right.

Q Had you occasion to use Gaston Company as an agent in selling any of the previous ones? A No, that was my first time that I ever had a broker to sell any restaurant.

* * *

163 A I received a call directly, and I believe it was maybe a week or ten days after opening the restaurant, from the Gaston Company. I received four or five telephone calls from the Gaston Company asking me if I would sell the business; that they had one client who was interested in purchasing the place and had been watching the place being built and they were very much interested in it and I, at that particular time, was not interested in selling the place.

* * *

Q When you sold your restaurants in the past, fourteen of them, didn't the purchaser usually inquire? A I said I sold fourteen. Three of them were torn down by the government.

Q Condemned? A No, when they fixed Pennsylvania Avenue.

Q Through a condemnation proceeding, but the others, didn't the purchaser ask what your sales were? A No.

Q Never? A Never.

Q Didn't they ask you what your net profit was? A No.

164 Q Did they ask you what your overhead was? A No.

Q Not in any of these cases? A No. Each and every one of those places that have been sold, I also bought those places before I sold them and the last place I sold before this one Shannon & Luchs, Mr. Taylor over there, who is present, still has my name on the lease and I am still responsible for it until November 1, 1951 because I sold it to the man who is operating it.

* * *

165 BY MR. INGHAM:

Q That was in 1946. You sold that restaurant?

A Yes.

Q Do you recall who you sold it to? A I sold it to Clyde Neadeau.

Q Did he inspect the premises before buying it? A I ran an ad in the paper just stating a restaurant for sale, giving a telephone number which was my store number. I put it in the paper one afternoon for the next day. I received a call about 6:00 o'clock in the afternoon from Mr. Clyde Neadeau. He gave me his name as Mr. Clyde Neadeau. He asked me where the place was and I told him. He asked me if he could come up to see me that night at 7:00 o'clock. I said, "Well, you can come up at 7:00 o'clock, it would be quite all right with me but we close at 8:30 so if you come at 8:30 we could sit down and go through the matter of you purchasing and I will give you a price and so forth."

So Mr. Neadeau arrived promptly at 8:30 and he didn't even want to go down and see my stock room. In fact, I said, "Mr. Neadeau"—right on the premises and I would say 20 minutes he was there he gave me \$2,000 as a deposit and I said, "Mr. Neadeau, aren't you going to let me give you a receipt and go to the basement?" We had to go out the back door and down the basement steps.

He said, "I know the place and you look like a
166 pretty honest person, I will take your word for it.
If you want to move it out, you can move it out."

* * *

BY MR. INGHAM:

Q But you did sell thirteen restaurants prior to
167 this one? A That is right.

Q And in no case did the purchaser ask you what the daily sales were or the profits? A No, indeed. Never.

Q At the time of settlement in the office of Mr. Taylor, isn't it a fact that the reason you were there so long was that you objected to every clause in that contract except the last one? A No, that is not true.

Q Isn't it a fact that you went through this bill of sale line by line and objected—

THE WITNESS: No, I did not.

BY MR. INGHAM:

Q Did you have any objection to this contract when it was presented to you or when you read it in Mr. Taylor's office? A No.

Q None at all? A No, I did not.

Q You testified that your first conversation with Mrs. Lockwood after the settlement was on the phone following the day she took possession, is that correct? A No, I did not. I said I went in the store on Saturday that she took the place over.

Q When did she call you? A She called me after I left the store that day. I never went back there while Mrs. Lockwood was there. She called me on Monday morning at 7:00 o'clock.

Q Do you recall having a conversation with Mrs. Lockwood on Wednesday? A Yes. I was either at the gas company or the light company with her.

Q Did she have occasion to call you Wednesday evening at home? A No.

Q She didn't call you at all? A No, she didn't.

Q You had no conversation with her on Wednesday at all? A No, I did not.

THE COURT: She said she was with her on Wednesday so she must have had some conversation with her.

MR. INGHAM: Other than going to the utility companies.

THE COURT: You mean did she have any conversa-

tion regarding the possible rescission of the contract, is that what you mean?

169 MR. INGHAM: Yes.

THE COURT: Did you have any such conversation?

THE WITNESS: No, I did not.

THE COURT: I understand her testimony to be that Wednesday all they did was to arrange for the electric light deposit or the gas deposit, whichever it was.

THE WITNESS: Yes.

BY MR. INGHAM:

Q I show you Plaintiff's Exhibit No. 15 and ask you to read that.

• • • • •

THE WITNESS: No, I don't recall this letter.

BY MR. INGHAM:

Q Mrs. Christakos, on March 25 was your home at 948 Shepherd Street, N. W.? A That is right, yes.

Q You don't recall receiving the original of this letter? A No, I don't.

Q You never have seen it? A This is the first time I have ever seen the letter.

170 Q Did you have a telephone conversation with Mrs. Lockwood on March 26? A No, I didn't talk to Mrs. Lockwood on the telephone from the Monday morning she called me.

Q You are quite sure you didn't call her on March 26? A No, I didn't call Mrs. Lockwood.

Q With respect to a letter you received from me? A No, I did not.

Q You are positive of that? A Yes, sir.

Q You testified you opened this restaurant on September 11 and that shortly thereafter, sometime in October, the street was torn up. Is that correct? A That is right.

Q When was the street restored to its normal condition? A The last week of December.

Q It was within that last week for sure? A Yes.

Q In other words, they had a street opening directly in front of your place from October to December, is that correct? A I wouldn't say the street was open in front of my place. I said my place was blocked in simply because of using that particular spot there, being
171 an intersection for the parking and keeping their equipment.

Q How long were the tracks torn up directly in front of your restaurant? A They started right around the middle or the last of October there and they cleared it up around the last of December.

Q In other words, the tracks were torn up in front of your place from the middle of October? A I would say about two months, two and one-half months. I can't recall whether it was the first of October or maybe the middle or the last of October that they began work but it was most of it. I would say about two, two and one-half months.

Q That was Capital Transit work? A Yes. They put new tracks in.

Q And you testified on direct examination that you estimated that that affected your weekly sales to the extent of \$400, is that correct? A It certainly did.

Q That is your estimate. That is your best estimate? A It is not my estimate. It is the truth. It certainly did hurt me.

Q In other words, had that condition not existed, you would have made \$400 a week more? A Yes; and
172 another thing I could say was that I even kept a couple of employees that I could have done without but because of them working with me a number of years and my wanting them in the place, I didn't lay them off. I kept them on and that also made my profit a little less.

Q But just referring to sales, the \$400 item is sales? A Yes. It hurt my business. I don't say it could have

hurt it exactly \$400. It could have been a little more or a little less.

Q Approximately? A Approximately. Right off, I would say maybe more, I couldn't say.

* * *

175 BY MR. INGHAM:

Q At the time you signed the listing card, had you a price fixed in your mind that you wanted for the restaurant? A No, I didn't. We discussed a price and, in fact, he had the price. I didn't. He also had the down payment but he told me nothing about it. I didn't know the man's name or who the man was. I don't even know if it was the man. All I know is he said he had a prospective buyer and he was interested in the place and that seemed to be the only place he wanted.

* * *

186 BY MR. INGHAM:

Q Mrs. Christakos, in these 14 restaurants you owned and operated prior to the Tasty Snack Bar, what was the longest period you operated any one of them? A That I couldn't tell you.

Q To the best of your recollection. A That I can't tell you.

Q You must have some idea. Take the latest one, the one you sold in 1946. How long had you operated that? A I operated that restaurant for about—let's see—about ten months.

Q And the one prior to that, how long had you operated it? A I don't know. I couldn't tell you.

Q Did you operate any of the 14 for a period of longer than ten months? A Oh, yes. One place, in fact, about 11 years.

Q Where was that place? A It was down on G Street, Northwest.

187 Q You started in the restaurant business in 1930, is that correct? A That is right.

Q Yes, the one you bought in 1930. A I didn't buy one in 1930.

Q Did you operate one? A Yes, I did.

Q Under what arrangement; a lease? A I rented a building from the government and opened up one.

Q You rented a building and you opened a restaurant? A That is right.

Q Did you equip that? A Yes, I did.

Q That was in 1930? A In 1930 and '31 and '32.

188 Q You operated this one for three years? A No, I didn't operate it for three years. I said I operated it from sometime in '31 to sometime in '32. It might even have been for two years.

189 MR. MAZZUCHI: I don't see the materiality of this. We are all over the lot in collateral matter that does not have any relevancy in this case.

THE COURT: I have been wondering what it is.

MR. INGHAM: I will state to the Court rather than to go through this.

THE COURT: Suppose it developed that she really never was in the restaurant business but she was in the business of buying and selling restaurants?

MR. INGHAM: That is correct, Your Honor.

MR. POKRASS: What effect would that have? Let's assume that were the case.

THE COURT: I assume he wants to argue from that that she built this particular restaurant for the purpose of sale. I don't say it is a good argument and I
190 am speculating perhaps, that she was going to wish it off on somebody.

Let's go a little further but not very far. I don't think the mere fact she was in the business of buying and selling restaurants would be persuasive to me.

being duly sworn as a witness, was examined and testified as follows:

THE COURT: Your full name is what?

THE WITNESS: Sol J. Pokrass.

THE COURT: And he is a member of the Bar and counsel in this case for the defendant and is called to the stand by the plaintiff.

Direct Examination

BY MR. INGHAM:

Q Mr. Pokrass, do you have the 1948 income tax return for Mrs. Belva Christakos? A Yes, I do.

Q That is a copy? A This is my copy.

Q And that return was prepared by you? A It was.

Q Does that return reflect the operation of the Tasty Snack Bar for the period from January 1 through March 19? A This return reflects the statement as testified to by Mr. Caiopoulos who was the accountant for Mrs. Christakos.

Q And, in preparing this return, you took the
193 figures worked up by Mr. Caiopoulos, is that correct? A I took the identical statement without questioning it and incorporated that into the 1948 return.

Q And in arriving at the gross sales for that period, did you use Mr. Caiopoulos' statement of operations covering the period January 1 to March 19, 1948? A I said I used his statement and incorporated that right in the return.

MR. INGHAM: I have no further questions.

Direct Examination in Rebuttal

BY MR. INGHAM:

Q Mrs. Lockwood, you heard the testimony of Mr. Taylor? A Yes.

Q You were present at that settlement. Will you tell the Court what took so long at the time of that settlement? A Yes. I think Mr. Taylor had a very convenient memory in some respects and not at all—

MR. MAZZUCHI: Object to that, if the Court please.

THE COURT: Just answer the question.

THE WITNESS: Mrs. Christakos objected to all the statements on it. I mean she seemed to question everything.

195 BY MR. INGHAM:

Q Are you referring to this paper that was given to you and to Mrs. Christakos to read? A Yes; and they she and Mr. Lambros had talked about Mr. Lambros—

BY MR. INGHAM:

Q You also heard Mrs. Christakos' testimony with respect to her conversation with you? A Yes.

Q Is that a correct statement of what occurred at that time? A No, it is not.

Q Did Mrs. Christakos at any time at that settlement try to persuade you not to purchase this business?

196 A No.

Q Did she make any statement to you with respect to the inexperience of your son and your nephew? A No, I don't believe my son had very much to say. I mean he accompanied me but that was all.

Q You didn't understand me. Did Mrs. Christakos

make any statement to you about your son's inexperience? A No.

Q Did Mrs. Christakos call you on the Monday after you took possession of this business? A No, absolutely not.

Q When was your telephone conversation with her to which you testified yesterday? A What do you mean, about the business?

Q Yes, about turning the business back. A That was Wednesday.

THE COURT: Mr. Ingham, there is no testimony Mrs. Christakos called this lady. There is testimony this lady called Mrs. Christakos.

MR. INGHAM: That is correct. If I stated that, I want to correct it.

BY MR. INGHAM:

Q When did you call Mrs. Christakos? A I called her on Wednesday, Wednesday afternoon.

197 Q When did you come to my office? A Wednesday afternoon.

Q And that was on what date? A I think it was the 25th.

Q As a result of the testimony that took place here, did you find anything that refreshed your recollection with respect to having received a telephone call from Mrs. Christakos? A Yes, I was looking through my book and I found a notation in there—

MR. POKRASS: Object to that, if the Court please. The same thing was offered before and endeavored to be proven and objection was raised because it was in the nature of a diary with which she was attempting—

THE COURT: I am not going to permit it to be offered.

MR. POKRASS: She is testifying now as to the contents.

THE COURT: All she said was that she found the memorandum that she had made. I am not going to let her read that memorandum.

BY MR. INGHAM:

Q As a result of finding that memorandum, did you recall receiving any telephone call from Mrs. Christakos with respect to any letter? A Yes.

Q What was that? A What was the conversation?

* * *

198 THE WITNESS: Mrs. Christakos called me up early Wednesday morning to state she had just received a letter from Mr. Ingham and wanted to know who Mr. Ingham was since the name didn't appear on the letterhead and she was very much surprised that he had written her a letter like that; that she was going to take me to Mr. Ingham's office and see that I was ruined absolutely; that she was going to sue me until I had lost every cent that I had.

BY MR. INGHAM:

Q Did she specifically mention having received a letter from me? A She said she had received a letter signed by Mr. Ingham. The letter was dated the 25th of March.

MR. INGHAM: You may examine.

Cross Examination

BY MR. POKRASS:

Q Isn't it a fact, Mrs. Lockwood, that you bought this business for your son? Just answer the question.

A Well, partly, yes.

199 Q And isn't it a fact that you really gave up this business because it did become burdensome?

A No.

Q That isn't true? A No.

MR. INGHAM: I believe this goes beyond the scope of rebuttal examination.

THE COURT: I believe it does.

• • • •

Q Isn't it true that the reason you gave this business up was because you couldn't carry it financially? A No.

Q I show you this paper and ask you if you will please identify that? A Yes. That is a statement gotten up by the Riggs National Bank of Chevy Chase.

Q Showing what? A It shows a balance of \$23.63 for the Tasty Snack Bar but that doesn't give my own personal—

Q I appreciate that; but for whose account? A Tasty Snack Bar by Rosa L. Lockwood, Manager.

Q That is yourself? A Yes, but—

200 Q Thank you. A But this was obtained by opening mail. It was addressed to me.

THE COURT: I will strike that out.

MR. INGHAM: I don't see the materiality of it, Your Honor.

THE COURT: I don't either.

MR. INGHAM: I am going to object to it on the grounds it is immaterial.

MR. POKRASS: The point is this, Your Honor: While I appreciate the plaintiff's position all the way through this case, the fact remains that this business was really turned back because it became too burdensome and because she financially couldn't carry it.

THE COURT: Are we going into the financial details?

MR. POKRASS: To show the balance in her bank account only to prove that one point.

THE COURT: She says that is the bank account of the Tasty Snack Bar and that she had other assets.

MR. INGHAM: I still object to it. This is just one bank account.

THE COURT: I will let it in. I think it has very little materiality, however.

MR. POKRASS: I offer that as Defendant's Exhibit No. 1.

(The bank book of the Tasty Snack Bar, Rosa L. Lockwood, Manager, was marked Defendant's Exhibit No. 1 and received in evidence.)

• • • • •

202 THE COURT: Have we decided when Holy Week was in that year?

MR. MAZZUCHI: I brought with me this morning my perpetual Easter Sunday calendar.

THE COURT: You read it in and I will take it to be correct.

MR. MAZZUCHI: Easter Sunday for 1948 was March 28th.

THE COURT: I am going to assume that is correct and take judicial notice it is correct unless Mr. Ingham, at the time he argues his case, shows me otherwise.

MR. INGHAM: It looks like that is correct. It has about ten years of Easter Sundays in it.

• • • • •

203 MR. POKRASS: At this point, Your Honor, I think there is one thing that the Court should know which I have merely presumed the Court was aware of by reading the record and that is this: This business, after being closed for approximately eight and one-half months and counsel in the case on both sides realized that the practical solution was not being arrived at by its being closed—

THE COURT: That is right.

MR. POKRASS: So we all agreed, in order to mitigate any further damages, the store deteriorating, the premises not being rented, that the business should be restored to the defendant with the distinct understand that this would be a substitution for a foreclosure.

THE COURT: Yes, I read that. Would it be under-

stood that if I would set the sale aside, that the amount of damages would be the \$9,000?

205 THE COURT: As I understand it, if the decision should be for the defendant, then the defendant retains the \$9,000 and there is no further claim against the plaintiff, is that correct?

MR. POKRASS: That is correct.

THE COURT: And if I decide for the plaintiff, then the judgment would be in the sum of \$9,000 as against the defendant.

206 MR. POKRASS: That is what we understand.

THE COURT: Is that agreed by both you gentlemen?

MR. INGHAM: Yes.

241

Opinion of the Court

THE COURT: Gentlemen, I think that I am prepared to rule in this case.

In the first place, the agency of the Gaston Company has been established and their action was the action of the defendant in the case.

If we examine these three advertisements, we find them as follows:

"Sandwich Shop and Grill, Soda Fountain; large apartment above; busy thoroughfare; owner quotes \$250 daily, net \$2,000 monthly. Last word in new ultra-modern equipment. Air conditioning. Prettiest most up-to-date in Washington; 10 years' lease; rent, \$250, with apartment. Very simple operation. Must sell due to ill health. Price \$25,000. Terms. Nicholas Gaston Co. Woodward Building, District 7994-7765."

It is also shown that when that advertisement of December 4 was put in, the plaintiff called and, as a result of that, became interested in the restaurant.

That on January 18, this advertisement was put in:

242 "Quick Lunch Soda Fountain: corner busy thoroughfare; owner quotes \$250 daily; short order, no kitchen cooking; very attractive, modern, air conditioning; 10 year lease; rent, \$250; including large apartment; shows large profits; priced low; terms. Nicholas Gaston Company, 501 Woodward Building. District 7994-7765."

Then the advertisement which was read to the plaintiff and which went to the paper on March 4:

"Quick Lunch-Fountain. This is an outstanding buy deserving your immediate attention; owner will sacrifice due to ill health; busy northwest corner location; apartment above; long established; completely equipped; all ultra-modern, brand-new stainless steel equipment throughout; air conditioning; washable walls, etc.; cost over \$21,000 to equip; simple operation; no kitchen cooking; owner quotes average \$240 daily and increasing; showing large profits; lease 10 years; rent, \$250 month with apartment; priced below cost of equipment at only \$20,000; terms. Must be seen to be appreciated. Act now. Exclusive with Nicholas J. Gaston Co. 501 Woodward Building, District 7994-7765."

243 As I understand Judge Clark's opinion, the Court must consider all three of these advertisements. The Court which tried the case before did not do that and it was on that basis, largely, that the case was reversed.

If we examine these statements, I must find, despite the very able and ingenious argument of Mr. Pokrass, that the statements were false and, if not false, were made with reckless disregard of what the actual facts were because I cannot convince myself, by any manner of reasoning, that the profits were \$240 or \$250 a month. It doesn't say that they will be when the cartracks are removed or the work is done. It says, "owner quotes average \$240 daily and increasing."

And I must consider the difference in the parties. Plaintiff had never been in the restaurant business. She testified that she had bought a couple of rooming houses. The defendant, on the other hand, had bought and sold, I think, 15 restaurants over a period of a comparatively short time and obviously was a good business woman.

I, therefore, find that the statements made were false or either made with a reckless disregard of the truth. I say nothing with regard to whether the defendant knew of these statements but certainly if she didn't, her agent did and, in the eyes of the law, that is the same thing.

I further believe that the tender was proper. I believe Mr. Ingham's statement that the letter was
244 mailed. He laid a proper foundation for the introduction of the letter and I believe the letter was sent.

I also believe that even if the letter had not been sent, that the suit which was filed on the 29th of March, which was a day or so after the restaurant was closed, would have been sufficient tender. I do not know what else the plaintiff could have done to have tendered and offered to put the people back in status quo.

It therefore follows that the Court will find for the Plaintiff in the sum of \$9,000.

The Court does not know what the costs of the trusteeship are but, as they were for the benefit of both parties, the Court will divide them equally between the parties.

Mr. Ingham will prepare findings of fact, conclusions of law and submit them on two days' notice to the other side.

I think under the circumstances, Mr. Pokrass, that when you get those findings you might, if you object to them as I am sure you will, make your objections to the specific findings that he has and put in your counterfindings or objections so that I may have them easier to read over.

I want to say that you gentlemen have both tried the case ably and well. I wish you could have settled. It would have been much easier for the Court to have handled than to handle it in this way.

* * * *

Filed Jan 30 1951 Harry M. Hull, Clerk

Plaintiff's Exhibit No. 1

Nicholas J. Gaston Co.
501 Woodward Bldg.
Washington, D. C.

Date: Nov. 5, 1947.

I hereby give you the exclusive right for 90 days from date hereof to sell my business which is described on reverse side of this card, and on terms substantially as listed. Upon your procuring written offer and deposit from one willing to buy in accordance with this listing, you are entitled to a 10% commission on the price listed, or 10% of any lesser price accepted by me. If my business is sold, traded or exchanged during this exclusive period by myself or any other party or agent, I agree to pay you a cash commission of 10% of any price (which is accepted by me), whether said price is cash or terms, or both; minimum agreed commission to you \$100. In event I sell, trade or exchange the business and fail to inform you of the purchase price received, the maximum amount of sale price mentioned on reverse side hereof shall be without any further proof, presumed to be amount received by me.

I further agree that I will pay a commission of 10% of any price accepted by me if my business or any interest therein is sold, traded or exchanged to any of your clients

at any time following the expiration of this exclusive period.

/s/ Belva Amalia Christakos (SEAL)
Owner.

NICHOLAS J. GASTON CO., Brokers
/s/ L. P. Lambros

Pre-Trial Exhibit
AH Justice

AUTHORIZATION TO SELL

Trade Name *Tasty Snack Bar*
Owner's Name *Mrs. Amalia Christakos*
Owner's Business Address *4300 Georgia Ave. N. W.*
Bus. Phone *RA 3164* Res. Phone *RA 3129*
Rent *\$250 with apt. above*
Term of Lease *5 yr. + 5 yr. option*
Living Rooms *3 rm. apt. above with kitchen & bath.*
Full basement.
Light _____ Heat *Gas—brand new*
Amount of Stock (about) _____
Cost of Fixtures (new) _____
Weekly Receipts *\$245 day ave. and increasing.*
Suggested Price *\$28,500*
Suggested Down Payment *\$10,500*
Suggested Terms _____
How Long Established *13 by same owner.*
How long operated by you *2*
Hours of Operation *5:30 A.M. - 1 A.M. Closed Tuesdays*
Seating Capacity *26 Bar, Tables, Booths.*
Payroll *\$285 - 8 employees*
Type of Licenses _____

I, the owner, agree to procure necessary consents to assignment of lease.

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The above information is supplied by me and can be relied upon by agent.

(Air conditioned.)

/s/ Belva Amalia Christakos
Owner.

Open only 2 months. All equipment brand new & very modern stainless steel. All washable walls. Netting \$2500 month.

TASTY SNACK BAR

Filed Jan 30 1951 Harry M. Hull, Clerk

Plaintiff's Exhibit No. 2

Nicholas J. Gaston Co.
501 Woodward Bldg.
Washington, D. C.

Date: Mar. 3, 1948.

Gentlemen:

I hereby give you the exclusive right for 30 days from date hereof to sell my business which is described on reverse side of this card, and on terms substantially as listed. Upon your procuring written offer and deposit from one willing to buy in accordance with this listing, you are entitled to a 10% commission on the price listed, or 10% of any lesser price accepted by me. If my business is sold, traded or exchanged during this exclusive period by myself or any other party or agent, I agree to pay you a cash commission of 10% of any price (which is accepted by me), whether said price is cash or terms, or both; minimum agreed commission to you \$100. In event I sell, trade or exchange the business and fail to inform you of the purchase price received, the maximum amount of sale price

mentioned on reverse side hereof shall be without any further proof, presumed to be amount received by me.

I further agree that I will pay a commission of 10% of any price accepted by me if my business or any interest therein is sold, traded or exchanged to any of your clients at any time following the expiration of this exclusive period.

/s/ Belva Christakos (SEAL)

/s/ Peter A. Christakos B. C.

Owner

NICHOLAS J. GASTON CO., Brokers

Pre-Trial Exhibit

AH Justice

AUTHORIZATION TO SELL

Trade Name Tasty Snack Bar

Owner's Name *Peter & Belva Christakos*

Owner's Business Address *4300 Georgia Av.*

Bus. Phone *RA 3164* Res. Phone *RA 3129*

Rent *\$250 with apt above*

Term of Lease *5 yr. + 5yr. option*

Living Rooms *3 rm. apt. above with kitchen & bath full basement.*

Light _____ Heat *Gas - brand new.*

Amount of Stock (about) _____

Cost of Fixtures (new) _____

Weekly Receipts *\$245 day*

Suggested Price *\$20,000*

Suggested Down Payment *\$9,000*

Suggested Terms _____

How Long Established *13 yrs. by same owner*

How long operated by you _____

Hours of Operation *6 A.M. - 1 A.M. 7 days*

Seating Capacity *28*

Payroll

Type of Licenses

I, the owner, agree to procure necessary consents to assignment of lease.

The above information is supplied by me and can be relied upon by agent.

/s/ Belva Christakos

/s/ Peter A. Christakos B. C.

Owner

Air conditioned. All equipment brand new. Stainless steel. Washable walls. Netting 1,900 mo.

* * * *

Filed May 31 1949 Jan 30 1951 Harry M. Hull, Clerk

Plaintiff's Exhibit No. 3

SANDWICH SHOP, grill and soda fountain; large apt, above; busy thoroughfare; owner quotes \$250 daily and netting \$2,000 monthly. Last word in new ultra-modern equipment, air cond.; prettiest, most up-to-date in Wash.; 10 years' lease; rent, \$250 with apt. Very simple operation. Must sell due to ill health. Price, \$25,000. Terms. NICHOLAS GASTON CO., 501 Woodward Bldg., DI. 7994-7765.

Filed Jan 30 1951 Harry M. Hull, Clerk

Plaintiff's Exhibit No. 4

QUICK LUNCH-SODA FOUNTAIN; corner, busy thoroughfare; owner quotes \$250 daily; short order, no kitchen cooking; very attractive, modern, air cond.; 10 yrs. lease; rent, \$250, including lge. apt.; shows large profits; priced low; terms. NICHOLAS GASTON CO., 501 Woodward Bldg. DI. 7994-7765.

Filed Jan 30 1951 Harry M. Hull, Clerk

Plaintiff's Exhibit No. 5

Phones: DIstrict 7765 DIstrict 7994

NICHOLAS J. GASTON COMPANY, Brokers

Real Estate — Insurance — Loans

Suite 501, Woodward Bldg.

SALES CONTRACT

Washington, D. C. March 4, 1948

\$800.00 & personal note \$2,000.00

Received from ROSA LEE LOCKWOOD a deposit of the sum of \$800.00 & personal note \$2,000. Dollars, to be applied as part payment of the purchase price of owner's business known as TASTY SNACK BAR and located at 4300 Georgia Ave, N. W. Washington, D. C., which said business, in consideration of the premises, owner agrees to sell to above named buyer, and buyers agrees to buy from owner, on the terms hereinafter set forth:

Price of Business TWENTY THOUSAND (\$20,000.) as is— Dollars

Terms of Sale NINE THOUSAND (\$9,000.)— Dollars CASH and personal note of which above deposit shall be part, and the balance of \$11,000.00 payable at the rate of \$350.00 per month thereafter plus interest—with privilege of making larger payments. And to be Secured by a Chattel Deed of Trust and Note Signed by Buyer, with Interest at (6) Percent Per Annum with trustees to be Named by Owner, and Payable as above set forth.

The buyer agrees to comply with the terms herein of sale within 30 days plus additional time, if necessary to

transfer licenses from the date hereof, at the agent's offices, or the deposit made shall be forfeited, in which event one-half of said deposit shall belong to Owner's agent, Nicholas J. Gaston Co., Brokers, and the balance of the deposit shall belong to the Owner of the above described business; and the forfeiture of said deposit shall relieve the buyer from further compliance with the terms of this contract. Time for compliance is of the essence of the contract. Seller to comply with the Bulk Sales Act. Regular seller's agent's commission is earned upon procuring this offer; and purchaser agrees that said agent interested him in said business and is the sole procuring cause for his making this offer, and in consideration of which he agrees that he will not within one year from date hereof make a deal for said business directly with the Owner or through another broker unless the above named agent first receives his usual compensation.

This contract contains the entire agreement between the parties hereto. All verbal agreements and statements made and not set forth herein are null and void.

This contract is made in triplicate, and shall take effect when Owner leaves signed copy with agent.

Remarks: Sellers guarantees to give to purchaser a five (5) year lease and a five (5) year option calling for a rental on both restaurant and apartment above of \$250. per month,—said lease to contain the usual clauses contained in District of Columbia leases affecting similar premises. Sellers further guarantee to transfer to purchaser, Restaurant License as well as all other licenses pertaining to the business. Possession of business by purchaser to be effective 30 days from above date, at which time deal shall be consummated, or possession may be effective at an earlier date should the purchaser be able to consummate this deal at that time. Sellers agree not to engage directly or indirectly in a similar or competitive type of business within a radius of three blocks

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from above address for the next five years. This sale is being made in compliance with the Bulk Sales Act and business is being transferred to purchaser free and clear and without indebtedness.

NICHOLAS J. GASTON COMPANY—Brokers

By: /s/ S. Peter Lambros
(Agent)

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale, and acknowledge it to be our contract, as witness our hands and seals.

/s/ Rosa Lee Lockwood (SEAL)
(Purchaser)

/s/ Belva Christakos (SEAL)
(Amalia)
(Owner)

• • • •

Filed Jan 30 1951 Harry M. Hull, Clerk

Plaintiff's Exhibit No. 6

QUICK LUNCH-FOUNTAIN—This is an outstanding buy deserving your immediate attention; owner will sacrifice due to ill health; busy n. w. corner location; apt. above; long established; completely equip.; all ultramodern, brand-new stainless steel equip. throughout; air cond.; washable walls, etc.; cost over \$21,000 to equip; simple operation; no kit. cooking; owner quotes average \$240 daily and increasing; showing large profits; lease 10 yrs.; rent, \$250 mo. with apt.; priced below cost of equip. at only \$20,000, terms; must be seen to appreciate; act now. Exclusive with NICHOLAS J. GASTON CO., 501 Woodward Bldg., DI. 7994-7765.

• • • •

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Filed Jan 30 1951 Harry M. Hull, Clerk

Plaintiff's Exhibit No. 7

Phones: DIstrict 7765

DIstrict 7994

NICHOLAS J. GASTON COMPANY—Brokers

Real Estate - Insurance - Loans

Selling and Financing

Suite 501, Woodward Bldg.

Business Places

Washington 5, D. C.

March 4, 1948

Received from Rosa Lee Lockwood, check for Eight Hundred Dollars (\$800.00) and personal note for Two Thousand (\$2,000.00) Dollars payable in thirty days, to be held by this office in escrow as deposit relative to the purchase of the Tasty Snack Bar, 4300 Georgia Ave., N. W., Washington, D. C.

NICHOLAS J. GASTON CO.

By: /s/ S. Peter Lambros

S. Peter Lambros

Filed May 31 1949 Harry M. Hull, Clerk

Plaintiff's Exhibit No. 8

Bill of Sale

THIS INDENTURE WITNESSETH that BELVA CHRISTAKOS party of the first part and hereinafter referred to as the seller in consideration of the sum of TWENTY-THOUSAND (\$20,000.00) Dollars to be paid by ROSA LEE LOCKWOOD, party of the second part and hereinafter referred to as the purchaser, in the following manner:

Nine Thousand (\$9,000.00) Dollars at the signing of this instrument of which the deposit of Eight hundred (\$800.00) Dollars shall be a part and said payment shall include payment of the personal note heretofore delivered,

And the balance of Eleven thousand (\$11,000.00) Dollars to be evidenced by the purchaser's installment note made to the seller and payable in installments of Three hundred fifty (\$350.00) Dollars per month thereafter plus interest at the rate of (6) per centum (with the privilege of making larger payments, the first payment to begin the 20 day of April 1948, and on the same date of each month thereafter until fully paid, the seller.

this 19th day of March, A. D. 1948, bargains and sells and does by these presents, sell, convey, grant and transfer unto the said ROSA LEE LOCKWOOD, the purchaser all the sellers right, title, claim and interest in the restaurant business heretofore operated by the seller under the name and style of "TASTY SNACK BAR" and located at 4300 Georgia ave., n. w., in the District of Columbia, together with the business furniture, fixtures, equipment and stock in trade enumerated on the attached inventory which is made a part of this instrument by this reference as fully as if set out herein, together with the good will of said business, the trade name and all things contained therein and necessary to its operation.

THE SELLER hereby warrants the title to all fixtures, furniture, equipment, supplies and stock in trade herein sold and warrants that she has the right to sell the same and that she will warrant and defend the title transferred against the lawful claims and demands of all persons generally. The Seller further warrants that all things sold are free and clear of all liens, mortgages, conditional bills of sale and deeds of trust and are owned absolutely by the seller.

THE SELLER COVENANTS and agrees that she will deliver possession of said business, furniture and fixtures, stock equipment and the apartment above the store and the purchaser agrees to accept said delivery on the day of March, A. D., at the close of business day; that the

utilities, pay roll taxes and salaries of employees are to be adjusted as of date of possession.

THE SELLER agrees to lease the premises in which the store is located and the living quarters above the store for a term of five years with an option to renew for an equal term of five years for a rental of \$250.00 per month for the restaurant premises and the living quarters and the PURCHASER covenants and agrees to accept a lease upon the same rental terms including the period covered by the option.

THE SELLER guarantees to transfer to the purchaser the Restaurant license and all other and necessary licenses for the operation of said business and further that in the event that said licenses can not be transferred or new licenses issued to the purchaser then and in that event only this agreement and all things contained herein shall be void.

THE SELLER covenants and agrees to pay to the NICHOLAS J. GASTON COMPANY, business chance brokers as procuring cause of this sale the agreed commissions and does hereby authorize the broker to deduct same from the settlement and further to deduct all necessary monies to deliver said business to the purchaser free and clear of all claims, debts or liens; that the said broker is expressly authorized to make prompt payment from the purchase money and to retain all purchase money for a period of 0 days.

THE SELLER covenants and agrees that she will comply with the SALES IN BULK ACT in and for the DISTRICT OF COLUMBIA.

THE SELLER covenants and agrees that she will not directly or indirectly engage in the restaurant business or a competitive type of business within a radius of three blocks from above address for the next five years, that in the event she breaches this covenant or any part hereof

the seller covenants and agrees to pay to the purchaser the sum of TEN THOUSAND and no/100 Dollars as liquidated damages and provided further that this covenant or any part hereof shall not be binding upon the seller if the purchaser shall default in the payment of rent or in the payment of the unpaid purchase money.

THE PURCHASER covenants and agrees that the NICHOLAS J. GASTON COMPANY, their agent or servants has made no representations as to the volume of sellers business, profits or as to the value of the equipment or assets herein sold to her and further that the purchaser relies on her independent investigation in the execution of this agreement.

WITNESS our hands and seals on the date hereinbefore written.

/s/ Belva Christakos
Seller

/s/ Rosa Lee Lockwood
Purchaser

/s/ F. W. Taylor
Witness as to both

Acknowledgment

District of Columbia, ss:

I, Francis W. Taylor, a Notary Public in and for the District of Columbia, do certify that BELVA CHRISTAKOS and ROSA LEE LOCKWOOD whose names are signed to the foregoing writing and hereto annexed, bearing date on the 19 day of March, A. D., 1948 have acknowledged the same before me in the District aforesaid.

/s/ Francis W. Taylor
Notary Public, D. C.

(SEAL)

Affidavit

District of Columbia, ss:

BELVA CHRISTAKOS being first duly sworn on oath deposes and says:

That the following is a true list of the names, addresses, and amounts of indebtedness due all creditors of the said affiant in the conduct of the "TASTY SNACK BAR" at 4300 Georgia ave. n. w. in the District of Columbia.

Current Utilities

Current Taxes

That there are no other unpaid creditors and that the foregoing creditors will be paid in full and receipts exhibited to purchaser before the purchase money is demanded of the broker or received from them by affiant.

That there are no liens, chattel deeds of trust, recorded or unrecorded; conditional bills of sale against the furniture fixtures and restaurant equipment.

/s/ Belva Christakos
Belva Christakos

Subscribed and sworn to before me this 19 day of March, A. D. 1948.

/s/ Francis W. Taylor
Notary Public, D. C.

(SEAL)

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Filed Jan 30 1951 Harry M. Hull, Clerk

Plaintiff's Exhibit No. 15

Law Offices

ROGERS, FUREY and WISE

Southern Building

Washington, D. C.

COPY

March 25, 1948

Mrs. Belva Christakos
948 Shepherd Street N. W.
Washington, D. C.

Dear Madam:

Mrs. Rosa Lee Lockwood has consulted this office with respect to her purchase from you on March 19, 1948 of the business known as "Tasty Snack Bar" located at 4300 Georgia Avenue, N. W.

Mrs. Lockwood rescinds the contract of purchase because of misrepresentations concerning the business made by you and your agents and she hereby tenders the business back to you upon the refund to her of the \$9,000.00 paid in cash, the refund of the \$69.66 paid as rent to April 1, 1948, the refund of \$30.00 paid as attorney's fee, the cancellation of her promissory note to your order in the amount of \$11,000.00 and a cancellation of the lease executed by you and Mrs. Lockwood on March 19, 1948 for premises 4300 Georgia Avenue, N. W.

Mrs. Lockwood will make no further payments of rent nor will she make any payments on the promissory note and she will close the business as of the end of the business day on Sunday, March 28, 1948, and thereafter it will remain at your risk and expense.

Yours very truly,

SGI:m

cc: Nicholas J. Gaston Company

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Filed May 16 1951 Harry M. Hull, Clerk

Defendant's Exhibit No. 1

The Riggs National Bank
of Washington, D. C.
Chevy Chase Branch

Tasty Snack Bar by Rosa L. Lockwood, Mgr.
4300 Georgia Avenue, N. W.
Washington 11, D. C.

CC

Checks	Deposits	Date	Balance
Balance brought forward	200.00		
	8,500.00	48 Mar 18	8,700.00*
7,000.00		48 Mar 19	1,700.00*
1,200.00		48 Mar 19	500.00*
	90.00		
	74.64	48 Mar 22	664.64*
69.66	200.00	48 Mar 23	394.98*
88.74	27.61	48 Mar 24	278.63*
25.00	30.00	48 Mar 25	223.63*
100.00	100.00	48 Mar 26	23.63*

No. 11,023

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals

For the

District of Columbia Circuit

FILED SEP 14 1951

BELVA CHRISTAKOS, *Appellant*

Joseph W. Stewart

v.

CLERK

ROSA LEE LOCKWOOD, *Appellee*

**Appeal from the United States District Court
for the District of Columbia**

S. J. POKRASS

M. S. MAZZUCHI

1017 Denrike Building

Washington 5, D. C.

Attorneys for Appellant

STATEMENT OF QUESTIONS PRESENTED

1. The question is whether in a suit for rescission of a contract, relating to the purchase of a business in which fraud and misrepresentation of gross receipts and net profits is alleged, testimony by the plaintiff purchaser of conversations had with the husband of the defendant seller out of the presence of the defendant seller is hearsay testimony and prejudicial error when said conversations referred to the right to inspect the business premises and requests to inspect the business books and records, all of which testimony was allowed over defendant's objection.

2. The question is whether in a retrial of a cause in which plaintiff was allowed to materially amend her complaint immediately preceding such retrial the court was in error in allowing the transcribed testimony of a witness for plaintiff in the previous trial over defendant's objection.

3. The question is whether the court abused its discretion in allowing plaintiff to reopen her case over defendant's objection in order to offer evidence of tender in a suit for rescission of an executed contract after plaintiff announced close of her case and no further evidence to offer on direct testimony, and after argument by defendant on a motion for a finding in favor of defendant, said motion being based in the main upon the failure of plaintiff to offer any evidence of effective tender.

4. The question is whether in a suit for rescission of a contract relating to the purchase of a business in which fraud and misrepresentation of monthly net profits is alleged the court properly concluded that there was fraud and misrepresentation when there was no proof

of plaintiff's profits during her period of operation—a total of eight days.

5. The question is whether in a suit for rescission of a contract relating to the purchase of a business in which fraud and misrepresentation is alleged there was proof that defendant had any knowledge of the alleged fraud and misrepresentation and whether there was a showing that defendant intended to deceive plaintiff when there was uncontradicted testimony of defendant's lack of knowledge of the representation and her unwillingness to consummate the sale upon her discovery of plaintiff's inexperience consenting to the sale only after plaintiff's insistence to the point of a demand for "money double" for refusal to consummate the sale.

6. The question is whether the purchaser of a business can allege that the seller made misrepresentations respecting the business when such purchaser undertakes to make independent investigations of her own respecting said business before concluding the contract of purchase and the seller does nothing to prevent her investigation from being as full as she chooses.

7. The question is whether clear and convincing evidence has been shown so as to constitute fraud sufficient to justify a rescission of a contract to purchase a restaurant business for alleged fraud and misrepresentation of average daily sales and monthly net profit when the purchaser after three days of operations decided to close and did in fact close said business after eight days of operation, seven of which constituted Holy Week, a period of fasting and abstinence.

8. The question is whether the statement of the seller's broker to a prospective purchaser of a going restaurant business that he thought so much of said business that he had it inspected and investigated with

the view of going into said business with a friend constituted fraud in inducing said purchaser to buy said business in the light of her statement that a reduced selling price and the aforesaid opinion of said broker actually were the factors which led her to purchase said business.

9. The question is whether three newspaper advertisements can be said to be continuing representations constituting an inducement to enter into a contract of purchase when the first of such advertisements appeared approximately six weeks prior to the second advertisement which varied considerably from the first and although the plaintiff read the first advertisement she did nothing whatsoever by way of inquiry, examination or discussion regarding such business and only took action when the second advertisement appeared and finally purchased said business because of a reduced selling price and the broker's opinion.

10. The question is whether the burden of proving receipt of a letter by the addressee remains with and was met by the party asserting the delivery of a letter if evidence is introduced to show that the letter was not received.

11. The question is whether a legal presumption arises that a letter written and mailed is evidence of receipt by the addressee of said letter if the party claiming such legal presumption introduces contradictory evidence that such letter was received a day prior to the alleged writing and mailing of such letter.

12. The question is whether in a suit by the purchaser for rescission of a contract of purchase of a going business based upon alleged fraud and misrepresentation a letter offering to return the business upon the performance by the seller of several conditions constitutes effective tender.

13. The question is whether in a suit by the purchaser for rescission of a contract of purchase of a going business based upon alleged fraud and misrepresentation a letter by purchaser to seller stating that the purchaser, although aware of such misrepresentations, will continue to operate said business for three more days accepting benefits of such operation is an election by said purchaser affirming the contract, thereby barring an action to rescind although no bar to an action for damages.

14. The question is whether in a suit by the purchaser for rescission of a contract of purchase relating to inventory, fixtures, equipment and the premises of a going business, the party seeking to rescind must restore or offer to restore the subject matter of the contract as a condition precedent to the right to rescind the contract on the ground of fraud and misrepresentation.

15. The question is whether in a suit by the purchaser for rescission of a contract of purchase of a going restaurant business, the premises of which were also owned by the seller of the business, the purchaser having voluntarily ceased operating the business, padlocking the premises and retaining the keys thereof and causing the business and premises to remain closed for approximately eight months during which time the goodwill of the business was destroyed and the seller-owner denied the use of the entire premises, the subject matter of the contract was so dealt with that the parties could not be placed in status quo so as to justify a court in allowing a rescission of the contract.

16. The question is whether the filing of a suit by the purchaser for rescission of a sales contract in which the purchaser demands and obtains the appointment of a receiver to take and sell the business or equipment constitutes valid and effective tender of the business back to the seller.

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United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,023

BELVA CHRISTAKOS, *Appellant*

v.

ROSA LEE LOCKWOOD, *Appellee*

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Belva Christakos, defendant in the Court below, from a judgment of the United States District Court for the District of Columbia against the appellant in the amount of nine thousand dollars (\$9,000.00), interest thereon from March 25, 1948 and appellee's costs. This Court has jurisdiction to review the judgment under the provisions of Title 28 U. S. Code, Section 1291.

STATEMENT OF THE CASE

This appeal is taken from a judgment of the United States District Court for the District of Columbia against the appellant in the amount of Nine Thousand Dollars (\$9,000.00), interest thereon from March 25, 1948 and appellee's costs (Jt. App. 20). Appellee, plaintiff below, filed a complaint (Jt. App. 2-6) in two counts. Count one sought rescission of a sales contract, cancellation of a chattel deed of trust, cancellation of a promissory note, cancellation of a lease, refund of partial consideration paid, refund of rent, refund of attorney's fee and an appointment of a receiver to sell the business. Count two sought damages for deceit, fraud and misrepresentations, which were alleged as the basis of count one as well. This action was filed on March 29, 1948. At the first trial of this cause, after a motion for a finding in favor of appellant here, the lower court awarded a judgment dismissing the appellee's complaint on the merits. Appeal was taken thereon to the United States Court of Appeals for the District of Columbia Circuit and, on April 10, 1950, this court reversed and remanded the cause for a new trial.

At the second trial on January 23, 1951, the appellee amended count one of the complaint to include a representation "that the business was netting Two Thousand Dollars (\$2,000.00) per month" and elected to stand "solely on the rescission provision of count one" (Jt. App. 21).

On December 4, 1947, approximately three and one-half months prior to the purchase of appellant's restaurant business by appellee, appellee read an advertisement in a local newspaper which was inserted by a broker, having a listing for ninety days to expire on February 4, 1948, stating that the owner quoted that the

business was averaging Two Hundred and Fifty Dollars (\$250.00) in daily gross sales and netting Two Thousand Dollars (\$2,000.00) monthly (Jt. App. 23, 127, 131). As a result of reading this advertisement, appellee did nothing by way of purchasing the business or inquiring any further (Jt. App. 38).

On January 18, 1948, a second advertisement appeared in the newspaper which appellee read. This advertisement repeated the Two Hundred and Fifty Dollar (\$250.00) daily gross sales but made reference to profits as being large (Jt. App. 131). After reading this advertisement, appellee went to see the business (Jt. App. 38, 39) and made some personal investigations concerning it (Jt. App. 39), but decided that the price was too high (Jt. App. 38). Thereafter she was called by the broker on March 4, 1948 and told that the price of the business was to be reduced (Jt. App. 40) and that he was going to insert another advertisement in the paper on that day. This was also approximately six weeks after the second advertisement appeared in the paper. During this conversation with the broker, appellee was informed that the purchase price was reduced Five Thousand Dollars (\$5,000.00) (Jt. App. 41), and that he considered the business so well worth buying that he and a friend inspected and investigated it for the purpose of buying it themselves. Appellee concluded that if it was good enough for him to buy, it was good enough for her to buy and stated that the reduced price and the broker's opinion induced her to buy it (Jt. App. 40, 41). This third advertisement (Jt. App. 134) stated that the owner quoted average daily business of Two Hundred and Forty Dollars (\$240.00) and showing large profits.

Although the appellee never operated a restaurant business before (Jt. App. 37), she had engaged in a rooming house business in 1937, (Jt. App. 43) and in 1939 also purchased another rooming house business, both in

the District of Columbia (Jt. App. 43). Appellee made two visits to the business premises, once with her son (Jt. App. 27) and on another occasion with her sister (Jt. App. 27). On all the occasions of appellee's visit to the restaurant, she was impressed that it was "a nice business" (Jt. App. 38) but she never saw or talked to appellant and, although invited to return later in the day, she never did so. (Jt. App. 27). At no time prior to the settlement for the purchase of the business, did appellee ever talk to appellant, nor during the settlement did she ever ask appellant for the books and records pertaining to the business although she knew they were in appellant's possession (Jt. App. 47). At no time did appellant refuse the right of the appellee to inspect the books and records of the business (Jt. App. 47). On March 4, 1948, appellee signed a sales contract (Jt. App. 132) which contained no warranty clauses and which further contained a provision that all verbal agreements and statements not set forth in the contract were considered null and void. This contract provided for the purchase of appellant's restaurant business by appellee for Twenty Thousand Dollars (\$20,000.00), appellee paying Nine Thousand Dollars (\$9,000.00) in cash and the balance of Eleven Thousand Dollars (\$11,000.00) evidenced by a chattel deed of trust note secured by a chattel deed of trust on fixtures and equipment of said business. Appellee also obtained as part of this contract, a five year lease with a five year option on both the commercial and residential premises.

On March 19, 1948 after reading it (Jt. App. 88), appellee signed a bill of sale prepared by an attorney representing both buyer and seller (Jt. App. 90) which contained eight covenants (Jt. App. 135-138), only one of which applied to and affected the appellee, this covenant being "that the Nicholas J. Gaston Company, their agent or servant has made no representations as to the

volume of seller's business, profits, or as to the value of the equipment or assets herein sold to her and further that the purchaser relies on her independent investigation in the execution of this agreement". During the course of the settlement held in the office of the attorney who represented both buyer and seller, when the bill of sale was read and discussed, it became apparent to the seller, appellant, that the appellee was inexperienced in the restaurant business and she, appellant, being reluctant to proceed, made an effort to dissuade the appellee from buying the restaurant business (Jt. App. 89-90-101), the appellant, realizing that the appellee would be not only the purchaser of the business but a tenant who was assuming a long term lease. The appellant was precluded from calling this whole deal off by a threat of reprisal for "money double" from the appellee (Jt. App. 90, 102). At no time during the conversation concerning the bill of sale and the efforts of appellant to call the deal off, did it appear that appellant had any knowledge of any representations made by the broker (Jt. App. 110) nor did the appellee make known to the appellant that the broker had represented certain matters concerning average daily sales and monthly net profits nor did appellant see or know of the existence of any advertisements concerning her business in the newspaper (Jt. App. 107).

The following day appellee commenced operation of the business and after three days of operation (Jt. App. 45) she had decided to close the business but operated five more days, making a total operation of eight days (Jt. App. 45) when she closed the business and locked the premises. Appellee did not return the keys to the business and premises to appellant (Jt. App. 48). Instead, she turned them over to her, appellee's, attorney. Appellee commenced business on Palm Sunday which was the beginning of Holy Week, a week of fasting and abstinence (Jt. App. 79, 103), a period of general decline

of sales in the restaurant business (Jt. App. 103). During that week, appellee's daily gross receipts approximated One Hundred and Thirty Dollars (\$130.00) (Jt. App. 36). There was no showing of appellee's profits during her period of operation (Jt. App. 18).

During the trial of this cause, appellee was permitted to testify of conversations she had with the husband of the appellant out of appellant's presence concerning books and records of the business over appellant's objection (Jt. App. 27-29).

Also allowed in the instant trial over the objection of the appellant (Jt. App. 50-52) was the testimony of appellee's son given in the previous trial, notwithstanding the fact that the appellee had been allowed to materially amend her case, particularly Count I of the complaint which had reference to rescission of the contract for misrepresentation of average daily sales and monthly net profits. In the prior action, the question of monthly net profits was not a part of this count and consequently appellant was unable and did not have the opportunity to cross examine appellee's son concerning monthly net profits (Jt. App. 50-52).

At the conclusion of appellee's case, she announced such conclusion and no further direct evidence to offer (Jt. App. 80). Thereupon appellant argued a motion for a finding, said motion being based in the main on the failure of the appellee to offer any testimony of effective tender which is an essential element to sustain an action for rescission of a contract (Jt. App. 82-84). The following day, in an effort to show such effective tender after the court allowed appellee to reopen her case over appellant's objection (Jt. App. 84, 85), appellee's attorney produced a copy of a letter (Jt. App. 96, 140) which he found in his file and which he said he mailed to the appellant. In an effort to corroborate this testimony, the appellee testified of a conversation she

had concerning the letter with the appellant on a day certain, which day was, as a matter of fact, one day before the letter was allegedly written (Jt. App. 95, 96, 120, 121). The appellant denied receipt of this letter (Jt. App. 114). This letter purporting to rescind, which was allegedly sent by appellee to the appellant, professed knowledge of misrepresentations but, despite this fact, appellee continued to operate the business from the date of such letter, namely March 25, 1948 through the end of the business day of March 28, 1948, retaining all benefits acquired during that period from the operation of such business. On March 29, 1948 appellee filed this suit for rescission and in August, 1948 a receiver was appointed on appellee's motion (Jt. App. 13).

On September 30, 1948 the receiver represented to the court, among other things, that if the chattels were sold and removed from the premises, the expected proceeds would be the appraised value of Six Thousand One Hundred Twenty-Nine Dollars and Sixteen Cents (\$6,129.16) (Jt. App. 14). It became obvious to both sides that if the sale was had netting approximately Six Thousand Five Hundred Dollars (\$6,500.00) and the appellant prevailed in her counterclaim, there would be a possible deficiency of Four Thousand Five Hundred Dollars (\$4,500.00) against the appellee which she could not possibly satisfy. If the appellee prevailed, an award in her favor would not likewise be satisfied by appellant. As a result and to avoid foreclosure and risk of a deficiency judgment, appellee voluntarily restored the business to appellant in consideration for appellant's cancellation of the chattel deed of trust, cancellation of the lease and abandonment of the counterclaim. In addition, appellant agreed to secure appellee in the amount of Eleven Thousand Dollars (\$11,000.00) by executing a chattel deed of trust for Six Thousand Dollars (\$6,000.00) on the equipment, its appraised value if sold at a foreclosure sale

and a Five Thousand Dollar (\$5,000.00) second deed of trust on appellant's real estate all in favor of a trustee (Jt. App. 16).

Accordingly, on November 4, 1948, the receiver was withdrawn and appointed trustee under said deed of trust with instructions to either satisfy any final judgment in favor of the appellee out of the proceeds or if in favor of appellant to execute releases. In short, it was the agreement of counsel that the restoration of the business was a substitute for a foreclosure sale without prejudice to the merits of the parties' claims (Jt. App. 123, 124).

SUMMARY OF ARGUMENT

1. It is a violation of the hearsay rule to permit the testimony of a third person out of the presence of a party to an action on matters in issue. Such violation constitutes reversible error.

2. Where a material amendment has been made incorporating a new issue immediately prior to a second trial at which one of the original parties has been dropped, the allowance of the transcribed testimony of a witness in a former trial as evidence in the second trial, constitutes reversible error.

3. It is an abuse of discretion for the trial court to allow testimony after announcement by counsel of close of his case and after argument on a motion by counsel for a finding in favor of the adverse party where the reopening of the case is to produce evidence, the absence of which formed the basis for said motion.

4. He who alleges fraud and misrepresentation of monthly net profits must show his monthly net profits to sustain the burden of proof respecting such allegation.

5. Knowledge of fraud and misrepresentation on the part of the party alleged to have committed such fraud and misrepresentation, as well as the intent to deceive by such party, must be shown by clear and convincing evidence to sustain an action based upon such allegations.

6. Where the means of knowledge are available and the subject of purchase is open to inspection and the purchaser makes her own independent investigation and is at no time impeded by the seller in her efforts to investigate, the purchaser can not cry that he has been deceived by the seller's misrepresentations respecting the subject investigated.

7. Fraud is never presumed. It must be conclusively proved by clear and convincing evidence by the party alleging such fraud.

8. Opinions and commendatory language of a salesman concerning the subject matter he seeks to sell are not to be construed as statements of fact to be used as a basis for a finding of fraud in the inducement.

9. Where three advertisements of sale differ materially in context and six weeks elapse between such advertisements and nothing is done as to the first of such advertisements and the purchaser admits that the inducement to buy was a reduced selling price and a salesman's expression of opinion, it can hardly be said that such advertisements constituted an unbroken representation inducing such purchaser to buy.

10. Where one alleges the mailing of a notice by ordinary letter he has the burden of proving receipt of such notice by the addressee.

11. There is no legal presumption that a letter properly addressed and mailed by ordinary mail has been received by the addressee.

12. Offering the return of a business by letter on the condition of surrendering and cancelling certain obligations is conditional and hence ineffective as valid tender, particularly where part of the subject matter of purchase is sought to be tendered in such letter.

13. Where a buyer of a going business, after discovering an alleged fraud, continues to operate such business for several days thereafter, retaining the income therefrom, reducing the inventory to nothing and performing other acts of ownership, he is barred from an action of rescission of the contract of purchase.

14. Where a buyer purchases a going business and as part of such purchase obtains a lease from the seller for the premises upon which that business is conducted as well as residential premises, it is incumbent on the buyer to tender manually the keys to both the business and business premises as well as the residential premises before he can avail himself of the right to rescind the contract.

15. Where a buyer purchases a going business and after discovering an alleged fraud in the inducement of such purchase but retains the keys to such business, and does not make it possible for the seller to obtain the keys to such going business for approximately eight months during which time the equipment is deteriorated, goodwill of business is destroyed and income is lost from rental of commercial as well as residential portion of the premises, a court of equity should not decree rescission by the buyer because the parties cannot be restored to status quo.

16. The filing of a suit to rescind an executed contract of sale is not tender of the subject matter of the contract to the original owner. The filing of a suit to rescind a contract for the purchase of a going restaurant business, fixtures and equipment, inventory of stock in

trade, supplies, business and residential premises is not a tender of the subject matter of the purchase where such suit prays and results in the appointment of a receiver to take and sell the business or equipment.

ARGUMENT

I

Statements Made by a Third Person Out of the Presence of a Party to an Action Are Not Admissible in Evidence Against Said Party.

The Court was in error when it allowed testimony by the plaintiff, appellee, of conversations had with the husband of the appellant, (Jt. App. 27 and 29). This testimony related to the right of the appellee to inspect the business premises and certain alleged requests to inspect the business books and records. The allowance of this testimony over objection by the appellant (Jt. App. 27 and 28) was a clear violation of one of the fundamental rules of evidence. The rule referred to is the hearsay rule and as it relates to the subject matter herein, it is that statements of third persons made in the absence of a party to an action are not admissible against him unless they are such statements as are admitted under an exception to the hearsay rule or were made in the presence of one authorized to act for the absent party in respect to the subject matter of the conversation, 20 Am. Jur. Evid. ¶ 555. The husband in the instant case was not a party to this action and there is no evidence whatsoever showing that he was authorized to make statements for the appellant concerning any matters relating to the business transaction.

II

The Transcribed Testimony of a Witness in a Prior Trial Is Not Admissible Where the Plaintiff Has Been Allowed to Materially Amend Her Complaint and One of the Original Parties Has Been Dropped From the Suit.

The general rule is that testimony given in a previous trial may be introduced in a subsequent trial if the issues and the parties are the same or substantially the same, Wigmore Evidence ¶ 1386-87. This matter is said to be discretionary with the trial court. In the instant case, it is felt that the trial court abused its discretion when such testimony was allowed over the appellant's objection (Jt. App. 50-52) despite the fact that there was a material amendment allowed by the court (Jt. App. 21) and one of the parties in the prior trial had been dropped in the present trial. The amendment referred to related to matters concerning monthly net profits which were not in issue in the previous trial in that count of the complaint relating to a demand for rescission of the contract. Hence the witness was not and could not be subject to cross examination on these matters. It is submitted therefore that the court was in error in admitting such testimony primarily for the reason that there was no opportunity afforded the appellant to cross examine the witness on matters which appeared in the second trial which were not in issue in the first trial and upon which his testimony touched in the first trial (Jt. App. 53).

III

Appellee Should Not Have Been Allowed to Produce Testimony After the Announcement of Close of Her Case and Argument on a Motion for a Finding by the Appellant.

The discretion of the trial court in allowing testimony after announcement of close of a case is fundamental.

However, this discretion should be carefully exercised. It is respectfully submitted that the court greatly abused this discretion when it allowed appellee to reopen her case (Jt. App. 85) after she had announced close of her case and no further evidence to offer (Jt. App. 80) and after argument by the appellant on a motion for a finding in her favor said motion being based in the main upon the failure of appellee to offer any evidence of effective tender (Jt. App. 82-84) an essential requirement in a suit for rescission of a contract. As stated in Wigmore on Evidence ¶ 1878, the special danger of abuse for allowing testimony after argument lies in the opportunity which it affords for the deliberate coloring or manufacture of testimony to suit some specific need which becomes apparent only after opposing counsel's argument has revealed where emphasis of his claim is placed and what conclusions he founds upon the evidence as already presented. The great wisdom and logic of this statement by Mr. Wigmore is nowhere better illustrated than in the case at bar. The court, after ruling on appellant's motion, recessed for the day and it is submitted that the record will show that at the reconvening of the court on the following day, the appellee moved to reopen her case to introduce evidence seeking to show effective tender (Jt. App. 84) and was allowed to do so over strenuous objection by the appellant (Jt. App. 84). Thereupon the appellee introduced into evidence a copy of a letter (Jt. App. 96) purportedly written to appellant which appellant later denied having received. In an effort to corroborate this testimony, appellee testified that she had had a conversation with appellant concerning the alleged letter on a certain date, which date was in fact one day before the letter was allegedly written and sent by mail (Jt. App. 96 and 121), thus illustrating in a forceful manner the result of the abuse of discretion by the court in permitting the reopening of the appellee's case to the prejudice of the appellant.

IV

Failure to Prove an Essential Allegation of the Complaint Should Bar Recovery.

The appellee's action alleged that she was fraudulently induced to enter into a contract by false representations of the appellant's agent to the effect that the business was producing a specified amount of daily sales and net profit (Jt. App. 22). At the conclusion of the trial, the court found as a fact that the appellee made no showing of her profits during her period of operation—a total of eight days (Jt. App. 18). It is respectfully submitted that it was incumbent upon the appellee to show that her net profits were less than those which she alleges were represented to her and which she claims were false and fraudulent representations. Obviously she could not demonstrate this if she made no showing of her profits and therefore she failed to prove an essential element of her complaint which should be a bar to recovery. It is to say the least a contradiction for the court to find that appellee has failed to carry the burden of proof respecting her allegation relating to net profits and then to conclude as a matter of law that she was the victim of false representations. As stated by Judge Stephens in *Public Motor Service v. Standard Oil Co. of New Jersey*, 69 App. D. C. 89, 91; 99 F. (2d) 124, 126, "It is well settled that fraud must be shown by clear and convincing evidence." This was not fraud shown by "clear and convincing evidence" but fraud presumed in the face of lack of evidence. The authorities are clear and numerous that fraud is never presumed and the burden is upon the party alleging fraud to prove it. *Security Investment Co. v. Garrett*, 3 App. D. C. 69 and *Jaselli v. Riggs Nat. Bank*, 36 App. D. C. 159.

In an Action for Fraud and Misrepresentation, Knowledge of the Fraud and Misrepresentation and Intent to Deceive Must Be Shown.

Knowledge and intent to deceive must be proved in an action for fraud and misrepresentation. Judge Pickett in *Davis et ux v. C. I. R.*, 184 F. (2d) 86 stated the law in this respect quite clearly and succinctly when he said, "Fraud implies bad faith, intentional wrong doing and a sinister motive. It is never imputed or presumed and the courts should not sustain findings of fraud upon circumstances which at the most create only suspicion". In the case at bar, it is respectfully submitted that knowledge and intent to deceive were not shown. On the contrary, there was uncontradicted testimony by the appellant (Jt. App. 110), that she had no knowledge of misrepresentations and as to the question of her intent to deceive, there is clear uncontroverted and corroborated testimony that when the appellant became aware of the inexperience of the appellee in the restaurant business, she tried to advise the appellee that she was making a serious mistake in buying the business and wanted to cancel the whole deal (Jt. App. 89-90, 101). This she was precluded from doing because of a threat of reprisal (Jt. App. 102) from the appellee. This was corroborated by the testimony of the attorney who handled the settlement on the sale—a disinterested witness (Jt. App. 90). What could show more strongly the lack of intent to deceive? The finding of fraud made by the trial court was clearly erroneous on the entire evidence and should be set aside. The Supreme Court of the United States has stated, "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *U. S. v. U. S. Gypsum Co.*, 68 S. Ct. 525 (Page 542),

and where the evidence is uncontraverted, the Supreme Court of the United States has stated the law to be: . . . "where the testimony is all one way, and is not immaterial, irrelevant, improbable, inconsistent, contradicted or discredited, such testimony cannot be disregarded or ignored by judge or jury, and if one or the other makes a finding which is contrary to such evidence, or which is not supported by it, an error results, for which the verdict or decision, if reviewable, must be set aside. To hold otherwise would vest triers of the facts in cases subject to review with authority to disregard the rules of evidence which safeguard the liberty and estate of the citizen." *Kelly v. Jackson*, 6 Pet. 622, 631; 8 L. Ed. 523.

VI

If a Purchaser Investigates for Himself and Nothing Is Done to Prevent a Full Investigation, He Can Not Say That He Relied on the Vendor's Representation.

In *Shappirio v. Goldberg*, 192 U. S. 232, 24 S. Ct. 259, the United States Supreme Court reaffirmed the doctrine set forth in the case of *Southern Development Co. v. Silva* reported at 125 U. S. 247, to the effect that, "When a purchaser of a property undertakes to make investigations of his own respecting it before concluding the contract of purchase and the vendor does nothing to prevent his investigation from being as full as he chooses, the purchaser cannot afterwards allege that the vendor made representations respecting the subject investigated which were false." The Court, however, in *Shappirio v. Goldberg*, *supra*, seemed to go further and placed more responsibility on the vendee than the doctrine in *Southern Development Co. v. Silva*, *supra*, when it announced "*When the means of knowledge are open and at hand* (Italics supplied) . . . and no effort is made to prevent the party from using them, and especially where the purchaser undertakes examination for himself, he will not be heard to say that he

has been deceived to his injury by the misrepresentations of the vendor." To the same effect, see *Farrar v. Churchill*, 135 U. S. 609, *Farnsworth v. Duffner*, 142 U. S. 43. The Court of Appeals in *Bailey v. Smith*, 57 App. D. C. 369, in a still stronger statement of principle stated that where equal means to investigate are available to the buyer and no fraud or artifice is used by the seller to prevent inquiry or investigation, this was sufficient basis for the application of the rule of *Caveat Emptor*. This doctrine was reaffirmed in *Lester v. Superior Motor Car*, 73 App. D. C. 171. In the case at bar, the court found as a fact (Jt. App. 18) that the appellee visited the premises on two different occasions for the purpose of determining the volume of business (Jt. App. 26, 27 and 39). Appellee also testified that she at no time asked appellant for the books and records of the business (Jt. App. 47) although the record is replete with her testimony that on many occasions she discussed the books and records with the appellant's broker and husband. From the foregoing, it is clear that the appellee made investigations of her own and certainly no impediment was placed in her path to prevent her from making as complete an investigation as she wanted to make. It is respectfully submitted that appellee should not be now heard to cry fraud and misrepresentation after having investigated the subject matter of her purchase. It would appear that the court below, by its very finding that appellee investigated the business (Jt. App. 18), would be precluded from arriving at a conclusion and finding of fraud and misrepresentation. It is respectfully submitted that the court erred in this regard.

VII

Fraud Is Never Presumed and the Burden Is Upon the Party Alleging Fraud to Prove It Conclusively.

It is well settled in this jurisdiction that a person charging fraud has the burden of proving fraud, not merely by a preponderance of evidence but by clear and convincing

evidence, *Security Investment Co. v. Garrett, supra*; *Jaselli v. Riggs Natl. Bank, supra*; *Public Motor Service v. Standard Oil Co. of New Jersey, supra*. The court below erred in finding fraud and misrepresentation in the instant case which involves certain alleged representations as to average daily sales and monthly net profits. It is admitted by the appellee that she operated the business for a total of only eight days (Jt. App. 45), seven of which constituted Holy Week, a period of fasting and abstinence and general decline in sales in the restaurant business (Jt. App. 45, 79 and 103) and that she had decided to close the business three days after she started operations (Jt. App. 45). This testimony can hardly be the basis of a finding of fraud and misrepresentation of *average* daily sales and *monthly* net profit. By the extremely short period of appellee's operation, and particularly the time of her operation, it would be impossible for her to show that the *average* daily sales and *monthly* net profit were not as allegedly represented. Therefore, there is not merely a lack of clear and convincing proof of fraud but there is no proof of fraud. A mere suspicion of fraud or fraud presumed from suspicious circumstances is no evidence of fraud and certainly can not be the basis for a finding of fraud. *Davis v. C. I. R., supra*.

VIII

Opinion of a Broker Is Not to Be Construed as a Statement of Fact to Be Used as a Basis for a Finding of Fraud in the Inducement.

There is testimony by the appellee which leaves no doubt as to her reason for buying the business which is the subject matter of this case. She says that she was impressed by the business (Jt. App. 38) when she first went to see it, that her reason for not buying at that time was because she thought the sale price was too high (Jt. App. 38), that she later decided to buy the business because of the broker's opinion that he thought enough of it after

he had had it inspected and investigated to buy it for himself (Jt. App. 41) and that the sale price was reduced (Jt. App. 41). It is respectfully submitted that these circumstances do not by any standards lay the basis for a finding of fraud in the inducement. Even if we grant for the purpose of argument that the broker made the opinion statements referred to above, it is well recognized and settled that this is nothing more than "trade talk" or "puffing" on the part of a salesman. It could hardly be expected that he would not recommend whatever he was selling and employ commendatory language regarding it. Appellee should not now be heard to say that she relied on such opinions for she had no right to do so, and furthermore, by her own testimony, the reduced selling price was a prime factor in her ultimate decision to purchase the business.

IX

All of the Circumstances Should Be Considered in Determining Whether Three Newspaper Advertisements Amount to a Series of Continuing Representations Constituting One Inducement to Enter Into a Contract of Purchase.

The court below concluded as a matter of law that the three advertisements constituted continuing representations inducing the appellee to enter into the contract of purchase. It is respectfully submitted that a close perusal of all of the facts and circumstances surrounding the transaction and particularly the matter of the advertisements would result in a contrary conclusion and would clearly show that the court below erred in its conclusion. The first advertisement appeared on December 4, 1947 and it is appellee's testimony that although she read the advertisement she did nothing whatsoever by way of inquiry, examination or discussion regarding the business (Jt. App. 38). The second advertisement appeared approximately six weeks later on January 18, 1948. It dif-

ferred from the first advertisement in that it made no mention of net profit. Appellee testified that she read the second advertisement and, as a result, went to see the business (Jt. App. 38-39) and made some personal investigations concerning it (Jt. App. 39) but decided that the price was too high. Her testimony then is that she was called by the broker on March 4, 1948 and told that the price of the business was to be reduced (Jt. App. 29) and that he was going to insert another advertisement in the paper on that day. This was also approximately six weeks after the second advertisement appeared in the paper. As a result of the opinion of the broker expressed at the time of the third advertisement that he thought enough of the business to buy it himself and the reduced selling price, the appellee purchased the business (Jt. App. 40-41). This advertisement also differed from the other two advertisements. Appellee admits that the inducement to purchase this business was the reduced selling price and the broker's opinion (Jt. App. 40, 41). We submit, therefore, that the length of time between advertisements, the difference in the advertisements, the failure of appellee to act at all after the first advertisement, and her failure to buy after her investigation following the second advertisement, and her own statement as to the inducing factors which led her to buy on the day of the third advertisement are all factors which must necessarily preclude the conclusion that the advertisements were a series constituting one continuing representation inducing the appellee to enter into the contract.

X

Burden of Proving Receipt of Letter of Notice Remains With One Who Must Prove the Notice.

In the course of trial, appellee claimed to have mailed a notice of rescission to appellant (Jt. App. 96, 140). The notice was not mailed in a registered letter. The only tes-

timony regarding receipt of such letter was a complete denial by appellant (Jt. App. 114) and contradictory testimony by appellee herself that appellant discussed with her receiving the letter one day *before* it was allegedly written and mailed (Jt. App. 120, 121). Appellee's testimony and proof contradict each other and therefore should not even give rise to any presumption which in itself is no substitute for proof. *Masson v. Lake*, 45 U. S. 262, 11 L. Ed. 967. In the face of positive testimony that the letter was not received, the trial court erroneously concluded its receipt (Jt. App. 18, 19). In so doing, the court placed the burden of proof on the wrong shoulders. As stated in *Block v. Eastern Mach. Screw Corporation*, 281 F. 777, "Proof of mailing a letter may, and usually does, raise a so-called presumption that it was received, but this is a disputable inference of fact, and the burden of proof is not thereby shifted to the addressee; it remains upon the one who must prove the notice effected by the letter".

In case of this type states *Pariso v. Towse et al*, 45 F. (2d) 962, "* * * the office of a presumption must disappear when the opposite side puts in proof, and the party charged with the burden of proof must fail, if he goes no further, or cannot use his adversary's evidence as support of the affirmative. To hold otherwise would be to impose the burden of proof upon the party having the negative." See also *Ripy v. Cloverleaf Life & Casualty Co.*, 9 F. (2d) 324. In the final analysis, *Kerr v. U. S.*, 71 App. D. C. 222, 108 F. (2d) 585, states; "The act of mailing does not amount either to a tender or to a payment until actual receipt of the letter by the addressee. The rule in such cases is that the postal authorities are the agents of the sender." In ruling as it has in the present case, the trial court has accepted evidence of mailing as legal proof of receipt. "The evidence of mailing does no more than create a presumption that the letter reached its destination. Against it we have the defendant's denial in his

answer that the statement was received." *Curry v. Mackenzie*, 239 N. Y. 267, 146 N. E. 375. Also *Columbian Nat. Life Ins. Co. v. Rodgers*, 93 F. (2d) 740.

XI

No Legal Presumption Arises That a Letter Properly Addressed and Mailed Is Received.

The extent of a court's indulgence in the presumption of receipt arising from a letter properly addressed, stamped and mailed is discussed in *Henderson v. Carbondale Coal and Coke Co.*, 140 U. S. 25, 35 L. Ed 332, wherein the court said it "... is evidence tending to show that they reached their destination, and were received by the persons to whom they were addressed. This is not a conclusive presumption, and it does not even create a legal presumption that such letters were actually received; it is evidence tending, if credited by the jury, to show the receipt of such letter. . . . This presumption, which is not a presumption of law, but one of fact, is based on the proposition that the post office is a public agency charged with the duty of transmitting letters, and on the assumption that what ordinarily results from the transmission of a letter through the post office probably resulted in the given case."

We respectfully call the court's attention to the presumption of fact of receipt. Now if we examine the facts in this case, we find that on Thursday, March 25, 1948, appellee's counsel recalls by virtue of a copy in his files that he personally typed a letter for the purpose of tendering a business back to appellant. He also recalls personally mailing it to her (Jt. App. 96). This letter was not sent registered, a procedure usually followed by attorneys when mailing notices. However, at this point, the factual presumption arises that such letter was received—a mere presumption. Now the appellee herself, by positive testimony from her recollection (Jt. App. 120) and as a result of a memorandum (Jt. App. 121) insists

that on Wednesday morning appellant told her she *just* received the letter of appellee's counsel (Jt. App. 121). We now have positive testimony of fact by appellee contradicting her own presumption of fact. Can it now be said that the presumption of fact still exists? If to this we add the positive denial of receipt by appellant (Jt. App. 114) it would be a miscarriage of justice to permit that here shattered presumption to be the basis of a legal conclusion.

XII

Appellee's Letter of Tender Was Ineffective Because It Was Conditional.

This is an action to rescind a consummated contract of sale. It is basic that he who seeks to rescind must tender the subject matter of the contract to the other party. Appellee claims she did this by letter which the trial court concluded was sufficient tender (Jt. App. 19). In examining such letter we will find that the appellee tendered business back upon the refund to her of \$9,000.00 cash, refund of \$69.66 payment of rent, refund of \$30.00 payment to her attorney, cancelation of a promissory note made by her to appellant's order, and cancelation of a lease for the business and residential premises (Jt. App. 140).

That tender to be effective must be unconditional dates back to 1803 when the Supreme Court of the United States, in the case of *Hepburn and Dundas v. Auld*, 1 Cranch 321, 2 L. Ed. 122, held a requirement to the delivery of a deed for the delivery of a release, made such tender conditional and ineffective. In 1830 in the case of *Perkins v. Beck*, 4 Cranch C. C. (4 D. C.) 68, the court held that a tender of money upon condition of receiving a receipt in full is not a valid tender. Again in 1920 this court in *Davidge v. Simmons*, 49 App. D. C. 398, certiorari and error dismissed 257 U. S. 667, held, "To be effective as such, a tender must be unconditional."

As to whether the contents of appellee's letter were conditional, we have but to look at *Cameron County Water Improvement Dist. No. 8 v. De La Vergne Engine Co.*, 100 F. (2d) 523. In that case, it was argued that a plea of tender in a trial amendment wherein the appellant offered to give back certain engine and pump parts upon receipt by them of all notes, bonds and other obligations which were formerly delivered to offeree, was an effective tender. The court, in holding that a tender to be effective must be unconditional, assumed "for the sake of argument, that a tender would be effective if offered in a pleading" and noting that a condition of the tender was that appellee should "surrender . . . all the notes, bonds, and other obligations" held that "the pleading was therefore without effect as a tender." Those conditions are comparable to the conditions embodied in appellee's letter, and therefore renders the tender ineffective.

XIII

Continued Operation of a Business After Discovery of Misrepresentations Constitutes a Bar to Rescission.

Appellant further contends that one seeking rescission of a contract of purchase of a going business after discovery of a fraud or misrepresentation, that person has an election to disaffirm the contract and immediately tender possession to the other or to affirm the contract and seek damages. The election of one is a bar to the other. If the election to rescind is made, the courts are in agreement that the party rescinding receive no benefits under the contract.

In *Shappirio v. Goldberg, supra*, the court held "It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must, upon the discovery of the fraud, announce his purpose and adhere to it. If he continues to treat the property as his own, the right to

rescission is gone, and the party will be held bound by the contract. In other words, when a party discovers that he has been deceived in a transaction of this character, he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged by the rescission of the contract. If he chooses the latter remedy, he must act promptly, announce his purpose and adhere to it, and not by acts of ownership continue to assert right and title over the property as though it belonged to him. . . . he cannot after such discovery treat the property as his own and exercise acts of ownership over it which show an election to regard the same as *still* his and at the same time preserve his right to rescission”.

In the present case, after discovering the alleged fraud as stated in appellee’s letter (Jt. App. 140), assuming it had been received, the appellee collected and retained all the income from the business, reduced the inventory to nothing and performed other acts of ownership. Appellant submits that appellee’s “Conduct is wholly inconsistent with an election to undo the transaction and stand upon her right to rescind the contract”. *Shappirio v. Goldberg, supra.*

XIV

A Condition Precedent to the Right to Rescission Is the Restoration or Tender of Restoration of the Entire Subject Matter of the Contract.

It is axiomatic that a condition precedent to the right to rescission is restoration or tender of restoration of the subject matter of the contract sought to be rescinded. This condition precedent was at no time met or fulfilled by the appellee. She refused to comply with such condition by her refusal to send the keys back to appellant, thus legally claiming possession of the premises and contents (Jt. App. 48). If she desired to rescind the contract, she

should have manually released the keys, or as stated in *Thredgill v. Pintard*, 53 U. S. 24, 13 L. Ed. 877, "... if he desired to rescind the contract, it was incumbent on him to relinquish the possession of the quarter section and claim the cancelment of the contract. He cannot avail himself of the benefit of the contract and resist a performance of it on his part". The reason for the rule is laid down in *Andrews v. Hensler*, 73 U. S. 254, 18 L. Ed. 737, "The rule that he who seeks to rescind a contract of sale, must first offer to return the property received, and place the other party in the position he formerly occupied, so far as practicable, prevails equally at the civil and the common law. It is a rule founded in natural justice, and requires that the offer shall be made by the purchaser to his vendor upon the discovery of the defects for which the rescission is asked. The vendor may then receive back the property, and be able by proper care and attention to preserve it, or he may have recourse upon other parties, the remedies against whom might be lost by delay. He must be permitted to judge for himself what measures are necessary for his interest and protection, and if the purchaser by delay deprives him of the opportunity of thus protecting himself, he cannot demand a rescission of the contract".

It should be observed that the appellee did not make it possible for the appellant to give "proper care and attention to preserve" the business, equipment, and premises. In effect, by her letter (Jt. App. 140) and her testimony (Jt. App. 48), appellee says, "I am not going to give you the business, et cetera, voluntarily. I'm going to get a receiver to sell it so I can get my money. But you, appellant, will bear the risk and expense nevertheless". We venture to suggest that had possession been given at once, we would not be here today. But this not having been done, the requirement of the condition precedent not having been met by appellee, the eight months'

delay denying appellant the opportunity to preserve the business, et cetera, bars appellee the equitable remedy of rescission. "He who seeks equity should first do equity."

XV

Equity Will Not Decree Rescission Unless the Parties Can Be Restored to Status Quo.

It will be observed, accepting the evidence most favorable to appellee, that during the day of March 25, 1948, having discovered fraud or misrepresentations of daily sales and monthly net profits (although appellee operated then for a period of four days), appellee causes a letter to be written advising appellant that for that reason she, appellee, will rescind at the close of the day of March 28, 1948 (Jt. App. 140, 95, 96). Appellee further states that after said latter date the business will remain at appellant's "risk and expense". (Jt. App. 140). Having so advised appellant, appellee increases that risk by not giving the keys to premises to appellant (Jt. App. 48) and this condition so remained for approximately eight months. At that time, because of a pending foreclosure sale by the receiver, counsel for appellee and appellant agreed, without prejudice to merits of either party's case, as substitute for a foreclosure, that the business would be reopened by the appellant, who in turn would cancel all obligations of appellee and thus avoid a possible deficiency judgment against appellee. During that eight months the restaurant business was closed, appellant being unable to get it. At this late stage, appellant could not have been restored to status quo, the equipment having deteriorated considerably, the goodwill of the business destroyed, and the enormous loss of income both from the commercial and residential portions of the premises. While appellee sought rescission, she kept possession of the entire subject matter sought to be rescinded. Speaking of such circumstances, the court in *Gregory v. Keenan*, 256 F. 949, held "A party

is not permitted to rescind a contract for the purchase of realty, and at the same time keep possession of the whole or part of that which was bargained for. He must proffer a return of what he has received so as to place the vendor in status quo, before he will be entitled to a return of his purchase money, or any part of it. This is equitable, and, as a rule, it is settled by adequate authority. . . . A tender of the deed can hardly be recognized as a tender of possession for the purpose of rescission. It does not operate to place the parties in status quo, which signifies that the vendor must be reinstated in his original possession. . . . Thus considered, Keenan was not in a position to rescind, even had he tendered back possession; because he could not place the plaintiffs in possession of that which he bargained for in the condition in which it was at the time. Keenan is therefore not entitled to recover back the purchase money paid in pursuance of the agreement”.

As is the case here, appellant respectfully urges this court to consider the following remarks in *Grymes v. Sanders et al*, 93 U. S. 55, 23 L. Ed. 798, “A court of equity is always reluctant to rescind, unless the parties can be put back in status quo. If this cannot be done, it will give such relief only where the clearest and strongest equity imperatively demands it. . . . Times have changed. There is less demand for such property, and it has fallen largely in market value. Under the circumstances, the loss ought not to be borne by the appellant.”

By retaining the keys, refusing to voluntarily restore appellant to the business and residential premises, by instigating a receiver to take and hold the property and premises for eight months, appellee caused an impossible situation of status quo which she now asks for. “. . . It is a sound principle that he who prevents a thing being done shall not avail himself of the nonperformance he has occasioned.” *United States v. Peck*, 102 U. S. 64; *Sterns Company v. United States*, 291 U. S. 54, 62; *Stockstrom*,

Executor v. C. I. R., ... U. S. App. D. C., ... F. (2d) , 79 Wash. Law Rep. 845, 849.

XVI

Filing of Suit to Rescind Executed Sales Contract and for Receiver to Take and Sell Subject Matter of Contract Is Not Effective Tender.

It was also the trial court's conclusion that the filing of the suit in itself constituted sufficient tender (Jt. App. 19). Here the subject matter of the contract was a going restaurant business, fixtures and equipment, inventory of stock in trade, supplies, business and residential premises. While it was physically impossible to tender the actual subject matter of the contract, the keys to the premises containing and representing the subject matter were capable of physical delivery and tender. At no time did appellee make it possible for appellant to take such keys.

In the case of *Greenwood et al v. Watson et al*, 171 F. 619, the court stated the law to be thus: "Actual ability, accompanied by the immediate physical possibility of reaching out and laying hold of the money or thing to be delivered and making à *manual* (Italics supplied) proffer of it, or placing it in a position so that the tenderee, if he chose, may lay hold of it, must not only exist as a fact, but it must be made to appear at the time that the party has the money or thing ready for actual delivery."

This court in *Kerr v. U. S.*, *supra*, also held that "the word 'tender' is usually held to mean that the thing offered must be actually produced and placed in such a position that control over it is relinquished by the tenderer so that the tenderee may reach out and lay hold on it". At no time could appellant "reach out and lay hold" of the keys. As a matter of fact, this was prevented by turning the entire subject matter of the contract and keys to a receiver, not for delivery to appellant but rather to further alienate

the subject matter by sale. A tender of chattels "must be made in such manner as to vest title in the creditor". *Hughes v. Eschback*, 7 D. C. 66. The receiver is a third person, not the creditor or his agent. No valid tender can be made except to someone authorized by the creditor to receive in his behalf. *Berryhill v. Elleth et al*, 64 F. (2d) 253, *Galluchat v. Pittman et al*, 288 F. 917. Even "... the deposit of money to the credit of the other party to the contract and notifying him of such deposit does not constitute a tender". *Chambers v. Slether*, 238 P. 924. It is appellant's contention that the filing of suit is never tender. It is in the nature of a petition to adjudicate the rights of the parties. At best here, the appellee, by the filing of the suit, offered to give the business and equipment to a court appointed receiver to sell and disburse the proceeds in accordance with the court's ultimate decision after adjudicating the rights of the parties, rather than an offer to turn the business and equipment back to appellant. It should also be noted that at no time, by suit or otherwise, did appellee tender or offer to restore appellant to the residential premises which she, appellee, also acquired as part of the sales contract.

CONCLUSION

We therefore pray that the judgment below be reversed and that the case be remanded with instructions to enter a judgment in favor of appellant dismissing the complaint and costs to the appellant.

Respectfully submitted,

S. J. POKRASS

M. S. MAZZUCHI

1017 Denrike Building

Washington 5, D. C.

Attorneys for Appellant

No. 11,023

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA ~~United States Court of Appeals~~

For the
District of Columbia Circuit

FILED OCT 9 1951

Joseph W. Stewart

BELVA CHRISTAKOS, *Appellant*,

CLERK

v.

ROSA LEE LOCKWOOD, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

WILLIAM E. FUREY
STEPHEN G. INGHAM
Southern Building
Washington 5, D. C.
Attorneys for Appellee

No. 11,023

STATEMENT OF QUESTIONS PRESENTED

In the opinion of the appellee, the question is:

Whether, in the retrial of a cause involving a suit for rescission of a contract for the sale of a restaurant business, there was sufficient evidence of misrepresentation and fraud, considered by the standards suggested by this Court in its opinion on the previous appeal, to sustain a finding and judgment for the appellee.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 11,023

BELVA CHRISTAKOS, *Appellant*,

v.

ROSA LEE LOCKWOOD, *Appellee*.

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Appellant's statement of the case insofar as related to the pleadings and proceedings are substantially correct; however, there are inaccuracies and omissions with respect to the evidence and facts developed in the course of the retrial of this proceeding.

The appellee first became interested in the purchase of appellant's restaurant business as a result of reading the

advertisement of December 4, 1947 (J.A. 131). Contrary to appellant's statement that she did nothing further by way of purchasing the business or inquiry, the record (J.A. 24 and 25) clearly shows appellee spoke to appellant's broker and visited the premises where the business was conducted *prior* to reading the second advertisement of January 18, 1948 (J.A. 26). This Court on the previous appeal and the Court below on the retrial (J.A. 19) determined that the first advertisement, along with the later two, amounted to a series of continuing representations constituting one inducement to buy the business.

The opinion of this Court was followed by the trial judge on the retrial when he considered the disparity between the actual facts and the representations that existed prior to January 1. The trial judge found as a fact that the representations were false and recklessly made and determined as a conclusion of law that the representations were made with such a reckless disregard of the truth as to constitute fraud (J.A. 19).

STATUTES

Statutes involved are the relevant parts of the District of Columbia Uniform Sales Act, as follows:

Title 28, Section 1112 D. C. Code 1940.

"Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty. (March. 17, 1937, 50 Stat. 32, ch. 43 sec. 12.)"

Title 28, Section 1507 D. C. Code 1940.

"(1) Where there is a breach of warranty by the seller, the buyer may, at his election—

(d) Rescind the contract to sell, or the sale, and refuse to receive the goods; or if the goods have already been received return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price.

(5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by section 28-1402."

SUMMARY OF ARGUMENT

The Court below properly determined the written and oral representations inducing the appellee to purchase the business from the appellant were false and made with such a reckless disregard for the truth as to constitute fraud and that there was an effective rescission of the contract.

ARGUMENT

1. The Representatives Were Clearly Proved to Have Been False and Made With a Reckless Disregard for the Truth.

The Court, in its opinion on the prior appeal in this proceeding, No. 10316, *Lockwood v. Christakos*, 86 U.S. App. 323, 181 F. 2d 805, held:

"But inasmuch as we think that these advertisements amounted to a series of continuing representations

constituting only one inducement, it can hardly be said that the one of December 4 was any less of an enticement to buy than the one of March 4. It is our opinion that the December 4 ad was also a part of the inducement, and therefore the Court below should have considered the disparity between the actual facts and the representations that existed prior to January 1 in making its decision on the question of fraud."

The Court below, therefore, had to answer this question, "Was there such a disparity between the actual facts and the representations, made with a reckless disregard for the truth, as to constitute fraud?" From the facts adduced at the retrial, mostly uncontroverted, the Court found the answer to be "yes."

The December 4th ad unequivocally states that the business was, and had been, realizing \$250.00 a day in sales and netting \$2,000.00 a month. The figures pertaining to the operation, introduced into evidence without objection, clearly show the extent of the disparity between the facts and representations.

The business was opened by the appellant on September 11, 1947 (J.A. 61) and for the twenty days' operation for the month showed total sales of \$3,577.92 or average daily sales of \$178.89; net profit for this period (J.A. 60) was \$45.79.

The business was operated for thirty-one days during the month of October (J.A. 57), resulting in average daily sales of \$153.69 and net profit (J.A. 60) of \$389.97.

November, 1947, sales averaged \$143.61 for the twenty-five days of operation (J.A. 57 and 58) and net profit for the month (J.A. 61) amounted to \$71.35.

The figures covering the month of December further illustrate the pattern established in the preceding months; namely, steadily declining sales and resulting decrease in net profit. Appellant was open for business for twenty-seven days (J.A. 59) during the month, with total sales

amounting to \$3,104.78 (less than those for but twenty days for the first month she was in business) with a daily average of \$124.18. The day her first ad ran, December 4th, her sales amounted to only \$124.57, less than one-half the amount represented in the ad. The disparity becomes even more apparent when the representation of \$2,000.00 monthly net profit is considered in light of the evidence adduced from appellant's own books and records.

The foregoing summaries actually reflect the true condition of the business, not only from September 11 to January 1, but also from January 1 through March 19, 1948, before appellee took possession. The appellee operated the business for eight days, without notice of any kind to the public that there had been a change in ownership or management, and her average daily sales from March 20 through March 27, 1948, were \$134.17 (J. A. 36), somewhat better than those realized by the appellant during December.

The appellant testified (J. A. 103 and 115), in an effort to explain away the declining sales, that some streetcar track work caused her business to fall off as much as \$400.00 a week during November and December. The trial judge, having the opportunity to observe the witness, was not obliged to give full credence to this testimony, but even though he did, the facts still varied widely from the representations. In the first place, the appellant's ad did not say that sales would be \$250.00 if there was no construction work going on in front of the premises, it said she *was* doing \$250.00 a day. In the second place, even though we add \$66.00 a day to the averages for November and December, the sales would still be substantially below the representations. It is apparent that the trial judge was not impressed by the attempted explanation for the sudden increase in daily sales beginning on January 2, 1948; it is more likely that he accepted the testimony of appellant's auditor

(J. A. 76) that such a sudden increase is not normal, as indicated in the opinion (J. A. 125).

2. There Was an Effective Rescission.

The appellant, in her brief, has overlooked the pertinent provisions of the Uniform Sales Act (*supra*) when she says that the rescission was ineffective because it was conditional. The letter of March 25, 1948 (J. A. 140), which the Court below found as a fact was mailed and received, fully complies with the provisions of the Act, Title 28 Section 1507, (1)(d) *supra*. In addition to the letter, the Court below found that the suit for rescission, filed after the rejection of the tender by the appellant and within two days after closing the business, constituted an effective rescission.

The appellant also claims the rescission was ineffective because the parties could not be restored to status quo. Had the appellant elected to accept the tender upon receipt of the letter or upon being served with the complaint in this proceeding, the status quo could have been restored, as it was some eight months later by agreement of counsel (J. A. 15). It was the opinion of the Court below (J. A. 126) that the appellee had done everything possible by way of tendering and offering to put the parties in status quo and that the rescission was effective.

CONCLUSION

It is respectfully submitted that the evidence fully supported the findings of fact, that the conclusions of law were correct and that the judgment below should be affirmed.

WILLIAM E. FUREY
STEPHEN G. INGHAM
Southern Building
Washington 5, D. C.
Attorneys for Appellee

